Mary Sullivan, Ph.D., L.P.: Dr. Sullivan is an Assistant Professor of Neurology at the University of Minnesota Medical School. Dr. Sullivan performed a neuropsychological evaluation of Petitioner on August 22, 2002 based on a referral from Petitioner's primary care physician, Dr. Melby. Dr. Sullivan concluded that "[t]here was in fact no real evidence that he had sustained a closed head injury, e.g., an injury that would have produced cognitive effects" and that the testing results "were not consistent with the presence of memory problems secondary to a closed head injury." (R App 63a-64a)[2] Dr. Sullivan also noted "numerous implausible aspects of [Petitioner's] performance which raise questions about the effort he exerted throughout this evaluation." Specifically, Dr. Sullivan observed:

> First of all, [Petitioner's] IQ, as measured here, was found to be 80, that is, just barely within the low average range. This is simply not believable. There is no possible way that a head injury of the severity described by [Petitioner] could have lowered his IQ to this level. Furthermore, there were findings within the IQ testing that were also highly unlikely. [Petitioner] obtained a score on Vocabulary, which measures knowledge of vocabulary, that was in the low average range. This seems unusually low for a man who finished two years at Boston College and who used to make speeches and sell cars . . . Furthermore, knowledge of vocabulary is pretty invulnerable to the effects of a mild head injury . . . Third, [Petitioner] got just one item right on the Picture Arrangement – the first item. He then failed the next four items.

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[2] Petitioner's appendix includes only excerpts from Dr. Sullivan's report. The full report is included in Respondent's appendix at 39a-65a.

> This is a highly unusual performance, even for people who are mentally retarded. [Petitioner], even given how poorly he performed, is clearly not mentally retarded.

(R App 59a-60a)

Philip Sarff, Ph.D.: Dr. Sarff is a psychologist. Respondent retained him to examine and test Petitioner and to review Petitioner's medical records. The examination was performed on March 28, 2003. Dr. Sarff's findings echo those of Dr. Sullivan. He noted "a pattern of cognitive performance on current and past testing that shows inconsistency, and these inconsistencies were well documented in the neuropsychological assessment done on 8/22/02." (P App 84a) Among other things, Dr. Sarff noted that the results of memory testing showed low average performance on most scores and that "[g]iven this finding, along with convincing evidence from the measures of symtom [*sic*] exaggeration, it seems safe to conclude that the client is not suffering from dementia." (P App 85a) Dr. Sarff continued:

> [Petitioner's] pattern of deficits is not consistent with degenerative dementia, or dementia due to brain injury. Unfortunately, there is strong evidence that he consciously or unconsciously exaggerated symptoms for this evaluation. While one cannot automatically conclude that he showed the same pattern with the previous two neuropsychological evaluations, there is sufficient evidence to at least question the findings. Also, it is notable that for the current evaluation, the client was obviously aware that his motivation might be suspect because one of the first things he said was to reassure the examiner that he was not going to 'lie.'

(P App 85a-86a) The registered nurse retained by Respondent to review the entire contents of Petitioner's file concluded that "[b]ased on the objective medical documentation provided for review, the objective data does not even come close to the massive subjective complaints of the claimant." (P App 91a) Respondent upheld the denial of long-term disability benefits.

Proceedings Below. On November 26, 2003, Petitioner filed this action in state court, pleading a claim for state law breach of contract. (R App 1a-3a) Plaintiff also served a "Demand to Produce" on Respondent, seeking information in Respondent's claim file and a copy of the relevant disability policy. Respondent removed the matter to federal court and filed a motion to dismiss, arguing that Petitioner's state law claim was preempted by ERISA, 29 U.S.C. §1144(a). Petitioner responded by requesting leave to amend his complaint to plead a claim for benefits under ERISA, although Petitioner contended that his state law claim was not preempted by ERISA.[3] (R App 4a) Plaintiff's amended complaint included ERISA and state law claims. (R App 6a-11a)

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[3] Petitioner argued that ERISA preemption only applies when a benefit plan is "self-funded" and that it does not apply to insured ERISA plans. Petitioner's argument ignored the statutory definition of an "employee welfare benefit plan" which broadly includes plans that are funded "through the purchase of insurance or otherwise." 29 U.S.C. §1002(1). He also ignored decisions of this Court that apply ERISA's preemption provision to state law breach of contract and other claims that arise out of insured ERISA plans. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

Shortly after removal, the parties filed their Rule 26(f) Joint Scheduling Report. (R App 12a-15a) It was Petitioner's position that he would conduct the deposition of at least one person involved in the denial of Petitioner's disability benefit claim. Respondent stated that it would object to any depositions.[4] Both parties stated that they contemplated filing motions for summary judgment. (R App 12a, 13a-14a)

On January 27, 2004, the district court issued its Preliminary Pre-Trial Conference Order, setting a deadline for motions for summary judgment of May 1, 2004 and a discovery deadline of June 10, 2004. (R App 16a-17a) On February 2, 2004, the district court issued its Memorandum and Order dismissing Petitioner's state law cause of action as preempted by ERISA and allowing Petitioner to proceed with his ERISA benefit claim. (R App 18a-24a) On February 19, 2004, Respondent responded to Petitioner's "Demand for Production" by agreeing to produce the policy and the administrative record/claim file.

On April 5, 2004, Respondent filed its motion for summary judgment. Respondent contended that, based on the evidence in the administrative record, its decision to deny Petitioner's benefit claim was not arbitrary and capricious or an abuse of discretion.[5] Petitioner sought an

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[4] In the Seventh Circuit, as in other circuits, where an abuse of discretion standard is applicable, a court's review of a decision to deny ERISA plan benefits is limited to the evidence that was before the decision maker at the time of the determination. *See, e.g., Perlman v. Swiss Bank Corp. Long Term Comprehensive Dis. Protection Plan*, 195 F.3d 975, 981-82 (7th Cir. 1999). Because admissible evidence is so limited, Respondent took the position that discovery is likewise limited.

[5] The deferential review standard in the Seventh Circuit is termed an "arbitrary and capricious" standard rather than an "abuse of discretion" standard. The Seventh Circuit has ruled that the two

(Continued on following page)

extension to respond, stating that he intended to take a deposition of one of Respondent's representatives. Respondent moved for a protective order, arguing that any evidence obtained in the deposition was beyond the scope of admissible evidence in an ERISA benefit proceeding and that Petitioner had not timely noticed the deposition. (R App 25a-26a; 27a-34a) Petitioner responded, contending that he needed the deposition to determine if Respondent was acting in a "dual capacity" in processing Petitioner's benefit claim and that without the deposition, "the Plaintiff is unable tc determine whether [Respondent] acts as the insurer, interpreter, and the administrator of [Petitioner's] insurance policy. . . ." Petitioner argued that it was "impossible for Plaintiff to respond" to the motion for summary judgment without the deposition. (R App 36a, 37a)

On May 5, 2004, the district court granted Respondent's motion for protective order, ruling that "a deposition is not required to determine the administration [*sic*] record in this matter." (P App 19a) On May 12, 2004, Petitioner responded to the motion for summary judgment. He argued that Respondent acted in a dual role as administrator and insurer and that this should result in either a *de novo* review standard or a "sliding scale." Other than the alleged "dual role," Petitioner presented no evidence or arguments to support an alleged conflict of interest, nor did he present any arguments or evidence that an alleged conflict had any impact on the benefit denial.

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standards are equivalent. *See, e.g., Fritcher v. Health Care Service Corp.*, 301 F.3d 811, 816 n.4 (7th Cir. 2002) ("We note in passing that a previous decision from a panel of this court once noted a distinction between the 'arbitrary and capricious' standard of review and the 'abuse of discretion' standard of review . . . As we have subsequently pointed out, however, this appears to be a distinction without a difference.").

On May 28, 2004, the district court granted summary judgment in favor of Respondent. The court concluded that Respondent's decision was "amply supported by extensive medical records;" that the medical evidence "was in near unanimous support of the conclusion that plaintiff was not disabled as a result of any orthopedic conditions;" and that "the overwhelming weight of the medical evidence ... suggested that plaintiff's complaints were exaggerated and that he did not have significant cognitive impairment," including "the conclusions of Dr. Sullivan who was independent and not hired by defendant." (P App 16a)

The Seventh Circuit affirmed. The court noted that Petitioner's claim was supported by his family doctor and by a psychologist who saw Petitioner on a referral from Petitioner's family doctor. However, "[o]n the other side of the scale were the opinions of two orthopedic surgeons, two psychologists, a psychiatrist/neurologist, and a registered nurse." (P App 4a) The court quoted from several of the medical reports, including the conclusion that "there is strong evidence that [Petitioner] consciously or unconsciously exaggerated symptoms for this evaluation." (P App 5a) The court emphasized the findings of Dr. Sullivan, who was not on Respondent's payroll and who saw Petitioner on a referral from Petitioner's own doctor, and who "was also the first of three medical experts who questioned whether [Petitioner] was sandbagging during the tests." (P App 7a) Ultimately, the court of appeals stated as follows regarding Respondent's decision:

> [Respondent] gathered and reviewed the pertinent medical information, hired a number of physicians to evaluate [Petitioner] and review his medical files, and made an informed judgment about [Petitioner's] long-term disability application that coincided with the

> bulk of the medical evidence. When [Petitioner] appealed the initial determination, [Respondent] accepted additional medical information submitted by [Petitioner], had another psychologist evaluate [Petitioner], and hired a nurse to review [Petitioner's] entire file. Given this exhaustive process, [Respondent's] reasonable conclusions, and the absence of evidence of bad faith or conflict of interest, there is no basis to disturb [Respondent's] benefits determination.

(P App 9a)

REASONS FOR DENYING THE WRIT

The Petition raises two questions: (1) when and under what circumstances does an ERISA claim administrator that is also an insurer have a conflict of interest when deciding benefit claims?; and (2) what impact does such a conflict have on a court's application of the abuse of discretion standard?[6] Resolving one question without also resolving the other would provide the lower courts with little guidance. Unfortunately, the facts in this case make it a poor vehicle for resolving either one of these questions.

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[6] During the last term, this Court denied at least three petitions for writs of certiorari raising questions related to the conflict of interest of ERISA claim administrators – petitions that were filed by parties representing varied interests, including plan participants, self-funded plan sponsors, and plan insurers. *See Unum Life Insurance Company of America v. Fought*, No. 04-1000 (petition filed by benefit plan insurer in case decided by the Tenth Circuit); *Merck & Co. v. Epps-Malloy*, No. 04-995 (petition filed by self-funded plan sponsor and the plan's claim administrator in case decided by the Third Circuit); *Peach v. Ultramar Diamond Shamrock*, No. 04-919 (petition filed by claimant/plan participant in case decided by the Sixth Circuit).

I. THIS IS NOT AN APPROPRIATE CASE FOR RESOLVING WHEN AND UNDER WHAT CIRCUMSTANCES AN INSURER HAS A CONFLICT OF INTEREST GENERALLY BECAUSE THERE IS SUBSTANTIAL EVIDENCE OF RESPONDENT'S IMPARTIALITY IN DENYING PETITIONER'S CLAIM AND BECAUSE PETITIONER HAS WAIVED ANY OPPORTUNITY TO DEMONSTRATE BIAS BEYOND THE MERE FACT THAT RESPONDENT IS AN INSURER.

A. Because the Seventh Circuit Rejects "One Size Fits All" Assumptions about Alleged Insurer Bias, the Conflict of Interest Analysis in Each Case is Highly Fact-Sensitive.

Petitioner's criticism that the Seventh Circuit relies on "unsubstantiated economic assumptions" is not only ironic, but also misses the entire point of the Seventh Circuit's position on the conflict of interest issue. Petitioner's argument is ironic because the very basis of Petitioner's own argument is the unsubstantiated economic assumption that all insurers are always biased and that they always act in exactly the same biased way when determining benefit claims, regardless of the actual evidence in a particular case. The argument also misses the point of the Seventh Circuit's position, which is that the court refuses to engage in economic assumptions, one way or the other, and instead presumes neutrality unless the claimant demonstrates that the decision maker was biased and that this bias had an impact on the benefit denial.

The Seventh Circuit has repeatedly recognized that insurers experience countervailing business pressures when deciding benefit claims. On the one hand, insurers

are in business to make a profit and it is not impossible that there may be a temptation in some cases to deny borderline claims. *See, e.g., Leipzig v. AIG Life Ins. Co.*, 362 F.3d 406, 408 (7th Cir. 2004). On the other hand, the Seventh Circuit also recognizes that, in order to compete in the marketplace, there is pressure to pay claims because insurers recognize that overly "tight-fisted" claims decisions may discourage employers from buying their policies. *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1021 (7th Cir. 1998) ("Companies ... who choose which group insurance policies they will use to fund their plans ... have the sophistication and bargaining power necessary to take their business elsewhere if an insurer ... consistently denies valid claims."). Likewise, because insurers are generally well diversified, must maintain reserves, and are well funded, the impact of granting or denying benefits in a given case, "is miniscule compared to [the insurer's] bottom line." *Id.* at 1021; *Leipzig*, 362 F.3d at 409. Furthermore, there are various forms of insurance arrangements that affect who is ultimately liable for a benefit such that blanket assumptions about insurance arrangements generally may not be valid in a given case. *Leipzig*, 362 F.3d at 408 (some insurance arrangements contain adjustments in benefit rates and/or premium costs that "compensate employees for the risk of self-interested behavior"); *Perlman v. Swiss Bank*, 195 F.3d at 981 (discussing retrospectively rated insurance arrangements whereby benefit costs are reimbursed by the employer). The Seventh Circuit has also noted that a denial that turns on unique factual evidence, like the present case, is likely to have less overall impact on an insurer than a denial that turns on broader issues of policy interpretation that can potentially affect other claims. *Cozzie v.*

Metropolitan Life Ins. Co., 140 F.3d 1104, 1108 (7th Cir. 1998) ("Indeed, it has not been demonstrated that MetLife has a direct stake, in terms of its own financial health, in the outcome of this issue of interpretation."). Finally, the Seventh Circuit has questioned whether one can make a valid assumption in every case that an insurer's corporate profit motive actually impacts the individual employees who decide claims. *Perlman*, 195 F.3d at 981 ("[I]t is unsound for the judiciary automatically to impute the plan administrator's position to the person who decides on its behalf.").

Although the Seventh Circuit refuses to engage in general assumptions about insurer bias, the Seventh Circuit does consider the possibility that a given insurer may let partiality influence its decision in a specific claim. The court will consider "specific evidence of actual bias that there is a significant conflict." *Mers*, 144 F.3d at 1020. This includes evidence that "an insurer or plan administrator pays its staff more for denying claims than for granting them." *Leipzig*, 362 F.3d at 408-09. In other words, in each individual benefit dispute, if there is evidence that a decision was impacted by bias, the Seventh Circuit will consider that evidence and will adjust the amount of deference accordingly. If there is no such evidence, the Seventh Circuit will not engage in unsubstantiated assumptions about what may or may not have motivated the decision. Each ERISA benefit case in the Seventh Circuit stands on its own facts.

B. This Case is a Poor Vehicle for Deciding Whether or Not Insurers Generally Have an "Inherent" Conflict Because the District Court and the Seventh Circuit Emphasized that the Specific Facts of this Case Demonstrated that Respondent Acted Impartially.

Ignoring the specific facts in the present case, Petitioner contends that all insurers should always be clothed with the assumption that they act under perpetual "inherent" conflicts of interest. The problem with this argument is that, in this case, the record evidence contains multiple indications of Respondent's impartiality. First, even though substantial procedural defects in a claim decision can be evidence of potential bias,[7] there is no evidence of any substantial procedural defects in the processing of Petitioner's claim. To the contrary, the review process involved volumes of medical records, reviews and examinations by multiple experts in varied specialties, and the process was, by all accounts, extensive. Second, rather than merely relying on its own employees, Respondent retained several independent medical experts to review Petitioner's records and to examine and evaluate Petitioner. Many courts hold that reliance on independent experts is evidence that a decision is impartial.[8] Finally,

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[7] *See, e.g., Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160-61 (8th Cir. 1998) (Less deference may be accorded where a procedural irregularity "caused a serious breach of the plan administrator's fiduciary duty" and "has some connection to the substantive decision reached.")

[8] *See, e.g., Fought v. Unum Life Ins. Co. of America*, 379 F.3d 997, 1015 (10th Cir. 2004), *cert. denied*, No. 04-1000 (May 2, 2005) ("Where . . . a conflict of interest may impede the plan administrator's impartiality, the administrator best promotes the purposes of ERISA by obtaining an independent evaluation."); *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1148 (7th Cir. 1998) ("Seeking independent expert advice is

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Respondent relied on opinions from doctors to whom Petitioner was referred by his own primary care physician. Certainly, Petitioner cannot allege bias on the part of experts who examined Petitioner at the direction of his own doctor.

The record also directly refutes Petitioner's contention that the district court and the Seventh Circuit completely ignored any potential for a conflict of interest. To the contrary, both courts were careful to note evidence of impartiality. In its summary of the evidence, the district court specifically noted with respect to each medical professional, the means by which each expert was retained and by which party. (P App 12a-14a) Concluding that "overwhelming" evidence supported the decision that Petitioner's cognitive complaints were exaggerated and not disabling, the district court also noted that this conclusion was "particularly" supported by Dr. Sullivan "who was independent and not hired by defendant." (P App 16a) Obviously, the district court kept its "eyes peeled" for potential bias.

Affirming the district court, the Seventh Circuit also made several comments indicating that it carefully considered the potential for bias. Responding to Petitioner's argument that the court should defer to his primary care doctor, the court noted that the primary care doctor's opinions were contradicted by the opinions of specialists and that Petitioner made no effort to address the opinions that undermined his primary care doctor. (P App 6a) The court also specifically noted that Petitioner's primary care physician referred

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evidence of a thorough investigation."); *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 234 (4th Cir. 1997) (reliance on independent medical experts "greatly mitigates" any conflict of interest).

Petitioner to two of the psychologists who performed tests, and that one of them, Dr. Sullivan, was "the first of three medical experts who questioned whether [Petitioner] was sandbagging during the test." (P App 7a) Finally, the Seventh Circuit made the point that Respondent rendered its decision only after gathering and reviewing pertinent medical information, that Respondent hired a number of physicians and other professionals to examine Petitioner and to review his records, that Respondent employed an "exhaustive process" in evaluating Petitioner's claim, and that Respondent's decision was rendered free of any evidence of bad faith or conflict of interest. All of this shows that the courts did not ignore the potential for bias, but instead carefully noted the substantial evidence that the decision was rendered free of any partiality. Whatever this Court might ultimately determine as to whether or not insurers in general have an "inherent" conflict of interest, the facts in this case demonstrate that any such "inherent" conflict was more than neutralized and that any decision regarding when a conflict of interest exists generally will likely have no impact on the judicial review standard applied in this case.

C. Even Ignoring the Substantial Record Evidence of Respondent's Impartiality, if this Court Decides that Something More than a Mere "Inherent" Conflict is Needed before there is any Impact on the Abuse of Discretion Standard, Petitioner has Waived any Opportunity to Obtain any Evidence of Actual Bias Because He Failed to Appeal the District Court's Discovery Order.

In the district court, Petitioner contended that he needed the deposition of one of Respondent's employees to

determine if Respondent was acting in a "dual capacity." He also argued that without the deposition, "the Plaintiff is unable to determine whether [Respondent] acts as the insurer, interpreter, and the administrator of [Petitioner's] insurance policy. . . ." (P App 36a, 37a) In fact, Petitioner argued that it was "impossible for Plaintiff to respond" to the motion for summary judgment without the deposition. (P App 37a) The district court denied Petitioner's request and granted Respondent's motion for protective order. Contrary to his representations to the district court, it was not "impossible" for Petitioner to argue that Respondent had an inherent conflict, because that is exactly what Petitioner did argue to the district court, the court of appeals, and in his Petition before this Court.

As Petitioner recognizes, an "inherent" conflict is not enough in the Seventh Circuit, and Petitioner was required to show that an actual conflict impacted the denial. In some circuits, although a court's review of the substantive evidence in an ERISA claim is limited to the record developed before the claim administrator, a claimant may submit evidence outside of the administrative record regarding certain tangential issues, such as a potential conflict of interest.[9] Petitioner argues that the Seventh Circuit does not permit discovery into the conflict of interest issue. Assuming this is true, Petitioner's appeal to the Seventh Circuit would have offered a perfect opportunity for Petitioner to challenge that rule. Nevertheless,

[9] *See, e.g., Wilkins v. Baptist Healthcare System*, 150 F.3d 609, 618 (6th Cir. 1998) (an exception to the principle of not receiving new evidence at the district court level is when consideration of the evidence is necessary to resolve alleged bias on the part of the claim administrator).

Petitioner did not appeal the discovery ruling and that issue is now waived.[10]

The problem that Petitioner's waiver presents in terms of whether to grant the Petition is that it substantially narrows the range of holdings that are likely to impact this case. If this Court rules that an ERISA claimant is required to prove something more than an "inherent" conflict in order to modify the abuse of discretion standard, such a decision will make no difference in this case because Petitioner has not preserved his opportunity to meet this standard.

Apparently realizing that the record in this case is bereft of any evidence of bias (in fact, the record contains substantial evidence that Respondent was not biased), Petitioner attempts to submit materials from other cases, even though none of the materials relate to Respondent. At most, the deposition in *Armstrong v. Aetna Life Ins. Co.*, 128 F.3d 1263 (8th Cir. 1997) shows that the insurer in that case had a potential conflict because the insurer allegedly compensated its claim personnel for denying claims. The Seventh Circuit has indicated that it would consider such evidence if submitted in connection with a particular claim decision. *Leipzig*, 362 F.3d at 409 ("Unless an insurer or plan administrator pays its staff more for denying claims than for granting them, the people who actually implement these systems are impartial."). However, there is no such

[10] Failure to raise an issue on appeal constitutes waiver of any claim of error with respect to the lower courts' decisions on that issue. *See, e.g., HA-LO Indus. v. CenterPoint Props. Trust*, 342 F.3d 794, 801 (7th Cir. 2003); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 668 (7th Cir. 1998). "Where issues are neither raised before nor considered by the Court of Appeals, the Supreme Court will not ordinarily consider them." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

evidence in this case and Petitioner has waived any opportunity to develop such evidence by failing to appeal the protective order. The memo submitted with the plaintiff's trial brief in *Schneider v. Provident Life & Acc. Ins. Co.* (P App 117a) is, at most, ambiguous as to whether or not it proves any conflict. But again, the memo concerns a different insurer and does not relate to Respondent or to this claim. At most, it shows that an insurer in that case might have had a conflict in connection with that claim. Again, the Seventh Circuit would consider such specific evidence if it were related to Petitioner's claim. Ironically, *Schneider* was not even an ERISA case and it is not clear whether the memo was even admitted into evidence. At any rate, that case was tried to a jury under California state law and the jury rendered a verdict in favor of the insurer.[11] If the memo was admitted into evidence, it obviously did not impress the jury in that case.[12]

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[11] *Schneider v. Provident Life & Acc. Ins. Co.*, Cause No. 97-C-4646 (N.D. Cal.), Dkt. No. 223 (bench trial ruling that "[t]his was not an ERISA plan" and setting the matter for a jury trial); Dkt. No. 244 (judgment that plaintiff's state law claims are not preempted by ERISA); Dkt. No. 245 (judgment entered in accordance with jury verdict in favor of Provident Life & Accident Insurance Company and against plaintiff).

[12] Plaintiff's submission of pleadings from a foreclosure and a replevin action have nothing to do with any conflict of interest on the part of the Respondent, the sole question raised in the Petition. A social security administration decision also does not pertain to any question raised in the Petition. At most, it shows that an administrative law judge found Petitioner to be disabled under the rules that apply in social security proceedings based in part on evidence that was not presented to Respondent and not having the benefit of other evidence that was in Respondent's file. There is nothing in the benefit plan or in ERISA that makes the social security decision binding or even influential in Respondent's decision, particularly when the decision was not submitted to Respondent. This Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003) implies as much. *Id.* at 829-34 (discussing the differences between

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In summary, applying the fact-sensitive analysis required in the Seventh Circuit, both the district court and the Seventh Circuit carefully considered any possible bias and both courts concluded that there was substantial evidence demonstrating that Respondent was impartial. Furthermore, by failing to appeal the district court's discovery order, Petitioner waived any opportunity to demonstrate a conflict of interest beyond Respondent's alleged "inherent" conflict based on its dual role as claim administrator and insurer. These facts substantially limit the possibility that a review by this Court will have any impact on application of the abuse of discretion standard in this case or that it will change the result in this matter.

II. THIS IS NOT AN APPROPRIATE CASE FOR RESOLVING HOW A CONFLICT OF INTEREST MIGHT AFFECT THE ABUSE OF DISCRETION STANDARD BECAUSE THE SUBSTANTIVE EVIDENCE WEIGHED HEAVILY IN RESPONDENT'S FAVOR, MAKING IT HIGHLY UNLIKELY THAT LESSENED DEFERENCE WOULD CHANGE THE RESULT IN THIS CASE.

A. Given this Court's Decision in *Firestone*, the Impact of a Conflict of Interest on the Abuse of Discretion Standard Ranges From an Unaltered Abuse of Discretion Standard to Lessened Deference, Short of *De Novo* Review.

In the district court and the Seventh Circuit, Petitioner took the position that any conflict of interest should

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the laws regulating social security and the laws regulating private disability plans and holding that social security's treating physician rule does not apply to private disability plans governed by ERISA).

result in the application of either a *de novo* review standard or a "sliding scale." The former approach applies no deference whereas the latter approach applies different degrees of deference, depending on the magnitude of the conflict. This Court already rejected the former approach in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), when it declined to consider a claim administrator's impartiality as the criterion for determining whether to apply a deferential review standard.

In *Firestone*, the Third Circuit held that whether a claim administrator had a conflict of interest was the determining factor in whether to apply a deferential review standard in ERISA benefit disputes. This Court declined to follow the Third Circuit's reasoning and held that the application of deferential review must depend on the intent of the contracting parties, regardless of how a benefit plan is funded and regardless of whether the fiduciary is conflicted. 489 U.S. at 115. Thus, where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," courts must apply an abuse of discretion standard of review to fiduciaries' benefit determinations. *Id.* This Court acknowledged that in some cases, discretionary authority might be granted to conflicted claim administrators. In such cases, deferential review would still apply and the conflict would be "weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (citation omitted).

In summary, this Court has already determined that, regardless of any conflict on the part of the claim administrator, courts will enforce discretionary authority in plan documents, and will only take the conflict into account as a factor when applying the abuse of discretion standard.

As a practical matter, then, the potential impact that a conflict of interest may have on the abuse of discretion standard may range from no impact (i.e. full deference) to lessened deference, short of *de novo* review.

B. Even if this Court Holds that Less Deference Applies when an Insurer Decides ERISA Claims, it is Highly Unlikely that the Result would Change in this Case Because the Great Weight of the Record Evidence Would Still Support the Denial.

Assuming *arguendo* that this Court would decide that an "inherent" conflict arises from an insurer's "dual role" and that this type of conflict requires a court to grant less deference under the abuse of discretion standard, the lessened deference would have no impact on the final outcome in this case because of the strength of the medical evidence supporting Respondent's denial. The district court concluded generally that the denial was not only "reasonable" (i.e. not an abuse of discretion or arbitrary and capricious), but that it was "amply supported by extensive medical records." (P App 16a) With respect to Petitioner's orthopedic claim, the district court concluded that the "medical evidence was in near unanimous support of the conclusion that plaintiff was not disabled." Similarly, with respect to Petitioner's memory loss claim, the district court concluded that "the overwhelming weight of the medical evidence – and particularly the conclusions of Dr. Sullivan who was independent and not hired by defendant – suggested that [Petitioner's] complaints were exaggerated and that he did not have significant cognitive impairment." (P App 16a) On appeal, after noting that at least three experts concluded that Petitioner was

"sandbagging," the Seventh Circuit held that Respondent's decision "coincided with the bulk of the medical evidence." (P App 9a) The Seventh Circuit also noted that, while Petitioner's claim was supported by his family doctor and a psychologist who saw Petitioner on a referral from the family doctor, "[o]n the other side of the scale were the opinions of two orthopedic surgeons, two psychologists, a psychiatrist/neurologist, and a registered nurse." (P App 4a) Granted, both courts applied a deferential standard of review in light of Petitioner's failure to produce any evidence of a conflict or bad faith on the part of Respondent, but even a cursory reading of the decisions reveals that neither the district court nor the Seventh Circuit saw the benefit denial as a close call. Even if the courts had applied less deference, the evidence would still be "near unanimous" on the orthopedic claim and "overwhelming" on the cognitive claim, and Respondent's denial would likely be affirmed.

The same result would apply if this Court were to decide that a review standard close to *de novo* should result from the "inherent" conflict. In light of the weight of the record evidence, it is still highly likely that the denial would be upheld. In this respect, Petitioner's argument that summary judgment would not be appropriate because there were some disagreements among the reviewing doctors is not only wrong, but probably irrelevant.

Petitioner's argument is wrong for at least two reasons. First, to the extent that a court applies even minimal deference, the ultimate question of fact is not whether the denial was correct, but whether it was an abuse of discretion. A court can certainly make this determination on summary judgment, even when the record evidence contains disagreements among reviewing doctors and

particularly where the medical evidence in the record is so strong in favor of the denial, as in this case.

Second, Petitioner's argument is also wrong because of the manner in which ERISA benefit disputes are determined. If the district court did not grant summary judgment, it would sit as the fact finder in a bench trial.[13] The substantive evidence at trial would be exactly the same as at summary judgment, i.e., the written administrative record. In fact, Petitioner did not even suggest that the district court should consider other medical evidence not already included in what was an extensive medical record. In this type of proceeding, summary judgment is nothing more than "a vehicle for deciding" whether the denial was correct:

> The review utilized both by this court and the district court in this ERISA case differs in one important aspect from the review in an ordinary summary judgment case . . . [I]n an ERISA case where review is based only on the administrative record before the plan administrator and is an ultimate conclusion as to disability to be drawn from the facts, summary judgment is simply a vehicle for deciding the issue . . . This means the non-moving party is not entitled to the usual inferences in its favor. When there is no dispute over plan interpretation, the use of summary judgment in this way is proper regardless of whether our review of the ERISA decision maker's decision is de novo or deferential.
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> . . .

[13] In the Seventh Circuit, as in every other circuit that has decided the issue, ERISA benefit disputes are tried to the court and not to a jury. *See, e.g., Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998).

> Trial is not warranted because the record shows one doctor's diagnosis disagrees with another's, and the fact that judicial review is de novo does not itself entitle a claimant to a trial or to put on new evidence.

Orndorff v. Paul Revere Life Ins. Co., 404 F.3d 510, 517-18 (1st Cir.), *cert. denied*, No. 05-189 (October 11, 2005). In other words, Petitioner's assumption that disagreements among the medical experts would result in a denial of summary judgment if the court applied something close to a *de novo* review standard, is incorrect in an ERISA record review proceeding.

Petitioner's argument that summary judgment would not be appropriate under a less deferential standard is also irrelevant. Even if the district court denied summary judgment and conducted a bench trial on the record, applying minimal deference, the Petitioner would still bear the burden to prove by a preponderance of the evidence that Respondent abused its discretion. There is virtually no chance that Petitioner could ever meet this burden given the district court's conclusions that there was "near unanimous" support for the determination that he was not orthopedically disabled, and "overwhelming" evidence supporting the determination that Petitioner was exaggerating his complaints and was not cognitively disabled.

In summary, this case is not a proper vehicle for certiorari because, no matter what the Court decides regarding the impact of a conflict of interest on the abuse of discretion review standard, the record evidence is such that it is highly likely that Respondent's decision will still be upheld.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

MARY C. NASH
UNITED WISCONSIN
INSURANCE COMPANY
401 W. Michigan Street
Milwaukee, WI 53203
(414) 226-6510

MARK E. SCHMIDTKE*
SCHMIDTKE HOEPPNER
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**Counsel of Record*

Counsel for Respondent

October 28, 2005

STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

Elvis Kobs
65 County Road M
Star Prairie, WI 54026

Plaintiff,

v.

United Wisconsin Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

Other Contracts – 30303

COMPLAINT

(Filed Nov. 28, 2003)

NOW COMES Plaintiff by and through his undersigned attorneys, Novitzke, Gust, Sempf & Whitley, by Jason W Whitley, and for his complaint against defendant above named, states:

1. That the plaintiff, Elvis Kobs, is an adult resident of the State of Wisconsin and has as his residence 65 County Road M, Star Prairie, WI 54026.

2. That the defendant, United Wisconsin Group is an insurance company licensed to do business in the State of Wisconsin and is in the business of providing group benefit insurance to individuals and employers.

3. That on January 4, 2002 and all other times relevant to the causes of action set forth below, the plaintiff, Elvis Kobs, was covered by a policy of insurance issued by United Wisconsin Group.

4. That pursuant to the terms of that policy, Elvis Kobs is provided with disability benefits.

5. That pursuant to the terms of the benefit plan provided by United Wisconsin Group, the plaintiff was

provided short-term disability benefits from January 4, 2002 through July 4, 2002.

6. That after expiration of the short-term disability benefits, the plaintiff requested long-term disability benefits pursuant to the terms of the defendant's plan.

7. That despite meeting the qualifications and criteria for payment of long-term disability benefits, the defendants have denied said benefits to the plaintiff.

8. That the plaintiff has duly and properly complied with all administrative remedies provided by the plan in seeking review of the plans denial of long-term disability benefits.

9. That by and pursuant to the disability plan issued by the defendant, the plaintiff is entitled to receive long-term disability benefits.

10. That the defendant has denied long-term disability benefits to the plaintiff.

11. That such denial is a violation of the terms of the policy and constitutes breach of contract.

12. That since July 4, 2002, the plaintiff, due to injury and/or illness has been unable to perform the material duties of his regular occupation for a period of 180 days since the onset of total disability and through the 24 month period following the elimination period and the plaintiff has been unable to perform any of the material duties of any gainful occupation for which he may reasonably fitted by education, training or experience, due to injury and/or illness.

13. That as a result of said breach, the plaintiff has been damaged in an amount of money equal to his lost benefits, interest, attorney's fees, and other costs associated with this action.

Wherefore, plaintiff demands judgment against the defendant for a specific performance of the contract terms or in the alternative, damages including consequential damages plus costs, attorney's fees, pre-judgment interest and such other relief as the court deems just and equitable.

DATED: 11-26-03 **NOVITZKE GUST, SEMPF & WHITLEY**

/s/ Jason W. Whitley
Jason W. Whitley (ID # 1027052)
Attorneys for Plaintiff
314 Keller Ave No Ste 399
Amery WI 54001
(715) 268-6130

A TWELVE-PERSON JURY IS DEMANDED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

==========

Elvis Kobs
65 County Road M
Star Prairie, WI 54026 Case No: 04 C 0005 S

Plaintiff,

v.

United Wisconsin Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

==========

MOTION TO AMEND COMPLAINT

==========

Plaintiff, Elvis Kobs, by and through his attorneys, Novitzke, Gust, Sempf & Whitley, by Jason W. Whitley, hereby move to amend the plaintiff's complaint.

The basis for the motion is set forth below and in the attached memorandum of law:

1. The plaintiff filed an action in State Court based upon the breach of an employee provided disability policy.

2. The policy was not employer funded.

3. The defendant removed the state action to Federal Court pursuant to ERISA but the defendant is not an ERISA plan or an employer.

4. The defendant's removal may be proper if the subject insurance policy is covered by ERISA; the

removal is not proper if the insurance company defendant is not governed by ERISA.

5. The proper procedure following removal under such circumstances is to recharacterize the state action as falling with ERISA and file an amended complaint pursuant to 29 U.S.C. §1132.

6. The proposed amended complaint is submitted with this motion along with a memorandum of law supporting the motion to amend.

Dated this 15 day of January, 2004.

/s/ Jason W. Whitley

Jason W. Whitley (ID #1027052)
NOVITZKE, GUST, SEMPF & WHITLEY
Attorneys for Plaintiffs
314 Keller Avenue N. Ste. 399
Amery, WI 54001 (715) 268-6130

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

==========

Elvis Kobs
65 County Road M
Star Prairie, WI 54026

Case No: 04 C 0005 S

Plaintiff,

AMENDED COMPLAINT

v.

United Wisconsin Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

==========

Plaintiff, Elvis Kobs, by and through his attorneys, Novitzke, Gust, Sempf & Whitley, by Jason W. Whitley, as and for an amended complaint against the above named defendant, allege as follows:

I. FIRST CAUSE OF ACTION: ERISA CLAIMS

1. The plaintiff, Elvis Kobs, is an adult resident of the State of Wisconsin and has as his residence 65 County Road M, Star Prairie, WI 54026.

2. That the defendant, United Wisconsin Group is an insurance company licensed to do business in the State of Wisconsin and is in the business of providing group benefit insurance to individuals and employers.

3. That upon information and belief, this court may have original jurisdiction over this action pursuant to 28 U.S.C. §1331 as this action may arise out of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §101, et. seq.

4. That upon information and belief, the United State District Court for the Western District of Wisconsin is the proper venue for this action as all parties and all transactions between the parties arise and occur within said district.

5. That on January 4, 2002 and all other times relevant to the causes of action set forth below, the plaintiff, Elvis Kobs, was covered by a policy of insurance issued by United Wisconsi . Group.

6. That pursuant to the terms of that policy, Elvis Kobs was provided with disability benefits.

7. That pursuant to the terms of the benefit plan provided by United Wisconsin Group, the plaintiff was provided short-term disability benefits from January 4, 2002 through July 4, 2002.

8. That after expiration of the short-term disability benefits, the plaintiff requested long-term disability benefits pursuant to the terms of the defendant's plan.

9. That despite meeting the qualifications and criteria for payment of long-term disability benefits, the defendant has denied said benefits to the plaintiff.

10. That the plaintiff has duly and properly complied with all administrative remedies provided by the plan in seeking review of the plans denial of long-term disability benefits.

11. That by and pursuant to the disability plan issued by the defendant, the plaintiff is entitled to receive long-term disability benefits.

12. That the defendant has denied long-term disability benefits to the plaintiff.

13. That such denial is a violation of the terms of the policy and entitles the plaintiff to all rights and remedies provided by the Employee Retirement Income Security Act of 1974.

14. That since July 4, 2002, the plaintiff, due to injury and/or illness has been unable to perform the material duties of his regular occupation for a period of 180 days since the onset of total disability and through the 24 month period following the elimination period and the plaintiff has been unable to perform any of the material duties of any gainful occupation for which he may reasonably fitted by education, training or experience, due to injury and/or illness.

15. That plaintiff brings this action pursuant to 29 U.S.C. §1132 and demands enforcement of the provisions of the insurance plan, actual attorney fees, interest, costs, and any equitable relief necessary to protect the plaintiff's rights under the plan and under ERISA.

16. That pursuant to *Lutheran Medical Center v. Contractors, Laborers, Teamsters, and Engineers Health and Welfare Plan,* and *Rivera v. Benefit Trust Life Insurance Company*, plaintiff seeks prejudgment interest on the total of the delayed benefits.

17. That pursuant to 29 U.S.C. §1132 and *Merideth v. Navistar International Transportation Corporation,* the plaintiff demands payment of actual attorney's fees and costs incurred in the prosecution of this action.

WHEREFORE, plaintiff demands enforcement of the plan, payment of past benefits due, payment of future benefits due, actual attorney fees and costs, payment of interest on past due benefits and judgment against the defendant for all amounts past due with interest, costs

and attorney fees, and equitable relief as necessary to ensure defendant's compliance with the policy and ERISA.

II. Second Cause of Action – State Law Claims

18. That the defendant, United Wisconsin Group is an insurance company licensed to do business in the State of Wisconsin and is in the business of providing group benefit insurance to individuals and employers.

19. That, upon information and belief, the defendant may not be an ERISA plan subject to federal preemption of state law claims.

20. That on January 4, 2002 and all other times relevant to the causes of action set forth below, the plaintiff, Elvis Kobs, was covered by a policy of insurance issued by United Wisconsin Group.

21. That pursuant to the terms of that policy, Elvis Kobs is provided with disability benefits.

22. That pursuant to the terms of the benefit plan provided by United Wisconsin Group, the plaintiff was provided short-term disability benefits from January 4, 2002 through July 4, 2002.

23. That after expiration of the short-term disability benefits, the plaintiff requested long-term disability benefits pursuant to the terms of the defendant's plan.

24. That despite meeting the qualifications and criteria for payment of long-term disability benefits, the defendants have denied said benefits to the plaintiff.

25. That the plaintiff has duly and properly complied with all administrative remedies provided by the plan in seeking review of the plans denial of long-term disability benefits.

26. That by and pursuant to the disability plan issued by the defendant, the plaintiff is entitled to receive long-term disability benefits.

27. That the defendant has denied long-term disability benefits to the plaintiff.

28. That such denial is a violation of the terms of the policy and constitutes breach of contract.

29. That since July 4, 2002, the plaintiff, due to injury and/or illness has been unable to perform the material duties of his regular occupation for a period of 180 days since the onset of total disability and through the 24 month period following the elimination period and the plaintiff has been unable to perform any of the material duties of any gainful occupation for which he may reasonably fitted by education, training or experience, due to injury and/or illness.

30. That as a result of said breach, the plaintiff has been damaged in an amount of money equal to his lost benefits, interest, attorney's fees, and other costs associated with this action.

Wherefore, plaintiff demands judgment against the defendant for a specific performance of the contract terms or in the alternative damages including consequential damages plus costs, attorney's fees, pre-judgment interest and such other relief as the court deems just and equitable.

DATED: 1-15-04

NOVITZKE GUST, SEMPF & WHITLEY

/s/ Jason W. Whitley

Jason W. Whitley (ID # 1027052)
Attorneys for Plaintiff
314 Keller Ave No Ste 399
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(715) 268-6130

A TWELVE-PERSON JURY IS DEMANDED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Elvis Kobs
65 County Road M
Star Prairie, WI 54026

Plaintiff,

CASE NO: 04-C-0005-S
District Judge John C. Shabaz

United Wisconsin Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

RULE 26(F) JOINT REPORT

Pursuant to the Court's Order and Federal Rule of Procedure 26(f), the parties hereby submit this joint report to facilitate the scheduling and disposition of the above-captioned case:

1. **Potential Mediation or Settlement of Case**

During the 26(f) conference, the parties discussed the possibility of mediation in an effort to settle the case. The parties acknowledged the extent of the medical records at issue herein and the need for review of same. The parties also contemplate briefing summary judgment.

Consequently, should this case not be resolved as a result of summary judgment, the parties have mutually agreed to arrange a mediation. The Court's analysis of the summary judgment motion is likely to affect the parties' evaluation of the merits of this case and their respective

settlement positions. If the parties choose to pursue mediation, they will use a mutually-agreed upon private mediator and share the costs of mediation equally.

2. **Initial Disclosures/Mandatory Discovery**

The parties do not anticipate any changes to the timing, form or requirement for disclosures under Federal Rule of Civil Procedure 26(a).

The Plaintiff has requested a copy of the Defendant's administrative file and a list of persons materially involved in the Defendant's decision to deny long-term disability benefits. The parties have agreed that time need not be spent exchanging copies of medical records as it is likely they are in possession of identical documents. The Defendant has requested a list of the Plaintiff's relevant physicians. The Plaintiff claims he has insufficient information to specifically calculate a damage demand but will phrase his damage estimate in terms of how many months for which be is claiming to be disabled. The Defendant acknowledged that it has reinsurance relative to the claim at issue, and the Plaintiff has requested a copy of the applicable reinsurance agreement.

These disclosures will be made within the time set forth in Federal Rule of Civil Procedure 26(a)(1).

3. **Subjects of Discovery/Completion of Discovery**

Although the parties do not believe that this case requires extensive discovery, the Plaintiff has acknowledged that he wants to conduct the deposition of at least one person material in the Defendant's decision to deny long-term disability benefits to the Plaintiff. The Defendant has

indicated that it will object to such deposition(s) because, under an arbitrary and capricious standard of review, discovery that seeks to examine the thought processes of the decision-makers is precluded [*see Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999)]. The parties contemplate completing discovery within ninety (90) days of this report. The parties do not request any change in the discovery limitations imposed by the Federal Rules of Civil Procedure or Local Rules.

4. **Any Other Orders**

The parties do not request any additional orders from the Court at this time.

Dated this 27th day of January, 2004.

NOVITZKE GUST, SEMPF & WHITLEY
Attorneys for the Plaintiff

/s/ Jason W. Whitley
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UNITED WISCONSIN INSURANCE COMPANY

/s/ Carol L. Dorner
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Milwaukee, WI 53203
(414) 226-6[illegible]0

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELVIS KOBS,

Plaintiff,

v.

UNITED WISCONSIN INSURANCE COMPANY,

Defendant.

PRELIMINARY PRE-TRIAL CONFERENCE ORDER

04-C-005-S

Preliminary pre-trial conference was held by telephone in the above entitled matter on January 27, 2004, the plaintiff having appeared by Novitzke, Gust, Sempf & Whitley by Jason W. Whitley; defendant by United Wisconsin Group by Carol L. Dorner. Honorable John C. Shabaz, District Judge, presided.

ORDER

IT IS ORDERED that all dispositive motions to be filed during the pendency of this matter, to include motions for summary judgment, shall be accompanied by memoranda of law; opposing party being given 20 calendar days to respond; and the moving party 10 calendar days to reply.

IT IS FURTHER ORDERED that all motions for summary judgment and other dispositive motions shall be served and filed not later than May 1, 2004; motions for summary judgment in accordance with local rule, a copy of which is enclosed.

IT IS FURTHER ORDERED that nondispositive motions, to include procedural motions, may be heard upon five days notice on any Wednesday morning by telephone at 8:00 A.M. or earlier, moving party to initiate the telephone conference to 608-264-5504.

IT IS FURTHER ORDERED that discovery shall be completed and all depositions taken not later than June 10, 2004.

IT IS FURTHER ORDERED that the following discovery materials will not be filed with the Court unless they concern a motion or other matter under consideration by the Court: interrogatories; responses to interrogatories; requests for documents; responses to requests for documents; requests for admission; and responses to requests for admission.

IT IS FURTHER ORDERED that final pre-trial conference is scheduled for June 14, 2004, at 1:00 P.M., pursuant to the provisions of Order Prior to Final Pre-trial Conference, a copy of which is also enclosed.

IT IS FURTHER ORDERED that trial to the Court is scheduled to commence June 25, 2004, at 8:30 A.M.

IT IS FURTHER ORDERED that plaintiff's motion to amend complaint is GRANTED.

Entered this 27th day of January, 2004

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELVIS KOBS,

Plaintiff,

v.

UNITED WISCONSIN INSURANCE COMPANY,

Defendant.

MEMORANDUM AND ORDER

04-C-005-S

Plaintiff Elvis Kobs commenced this action in Polk County Circuit Court against defendant United Wisconsin Insurance Company alleging breach of contract and seeking benefits allegedly due under a long-term disability policy held by plaintiff's former employer and insured by defendant. Defendant removed pursuant to 28 U.S.C. § 1441(a) arguing that plaintiff's breach of contract claim is preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(e)(1). Defendant then moved to dismiss plaintiff's breach of contract cause of action as preempted by ERISA. Plaintiff was granted leave to amend the complaint to state an ERISA claim. The matter is presently before the Court on defendant's motion to dismiss plaintiff's second cause of action for breach of contract as preempted by ERISA. The following facts are taken from plaintiff's amended complaint and the policy, which was referred to in the complaint and provided to the

Court in the form of an attachment to defendant's motion to dismiss.[1]

BACKGROUND

Plaintiff was a participant in a long-term disability group insurance policy issued by defendant to plaintiff's former employer Bernard's Northtown, Inc. Plaintiff received short-term disability benefits from January 4, 2002 through July 4, 2002. After plaintiff's short-term benefits expired, plaintiff requested long-term benefits. Plaintiff's request was denied. Plaintiff exhausted his administrative remedies and brought suit for breach of contract alleging a violation of the terms of the policy.

MEMORANDUM

Defendant moves to dismiss plaintiff's second cause of action for breach of contract arguing that it is preempted by ERISA. Plaintiff states in his brief in opposition to defendant's motion that "defendant may not have a sufficient basis to assert that this case is governed by ERISA because the defendant is not an employer and is not an ERISA plan. The defendant is an insurance company." Citing *Perto v. D.W.G. Corp.*, 148 Wis. 2d 725, 727, 436 N.W.2d 875, 876 (Ct. App. 1989), plaintiff argues:

> The general rule is that ERISA does preempt state claims regarding employer sponsored benefits plans. However, the general rule only applies

[1] Documents that a defendant attaches to a motion to dismiss are properly considered if they are referred to in the plaintiff's complaint and are central to his claim. *Venture Assocs. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

> to circumstances where the 'plan' is self-funded and is not insured. If the plan is insured, then state regulation is 'saved' from preemption. ERISA only preempts state law claims if the plan under consideration is an uninsured plan, that is, funded through employer/employee contributions rather than through purchased private insurance.

Plaintiff's argument is unpersuasive.

Plaintiff' alleges a state law cause of action for breach of contract against an insurance company seeking to recover benefits allegedly due under a welfare benefit plan established by plaintiff's former employer through the purchase of insurance from defendant. Such a cause of action is preempted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1986). Accordingly, defendant's motion to dismiss plaintiff's breach of contract cause of action must be granted.

Plaintiff's argument confuses the relationship between ERISA's three main preemption-related provisions: the "preemption clause," the "saving clause," and the "deemer clause." The "preemption clause" provides that if a state law relates to an employee benefit plan, then the state law is preempted unless it is "saved" from preemption by the saving clause. 29 U.S.C. § 1441(a). The "saving clause" excepts (or "saves") from the preemption clause any law that regulates insurance. *Id.* § 1144(b)(2)(A). Finally, the "deemer clause" clarifies that state laws which purport to regulate insurance (and would therefore otherwise fall under the saving clause) may not deem an employee benefit plan to be an insurance company. *Id.* § 1144(b)(2)(B).

The first preemption-related clause is the "preemption clause." The preemption clause applies to any "state law" that "relate[s] to" an "employee benefit plan." *Id.* § 1441(a). ERISA defines the term "state law" broadly to include "all laws, decisions, rules, regulations, or other State action having the effect of law." *Id.* § 1144(c)(1). Accordingly, the U.S. Supreme Court has interpreted the term "state law" to include common law causes of action for breach of contract. *See Pilot Life*, 481 U.S. at 47-48 & n.1. The phrase "relate to" in the preemption clause has a "broad common-sense meaning." *Id.* at 47. A state law "relate[s] to" an employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1984) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). Plaintiff's state law cause of action has a connection with the long-term disability group insurance policy because his claim seeks benefits allegedly due under the policy. *See Pilot Life*, 481 U.S. at 47-48. Accordingly, plaintiff's breach of contract cause of action invokes a "state law" that "relates to" the group insurance policy. The inquiry then becomes whether the policy is part of an "employee benefit plan."

An "employee welfare benefit plan" is one type of "employee benefit plan." 29 U.S.C. § 1002(3). An "employee welfare benefit plan" is defined in relevant part as follows:

> any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training

> programs, or day care centers, scholarship funds, or prepaid legal services.

29 U.S.C. § 1002(1).

Defendant's policy is part of an "employee welfare benefit plan." Plaintiff was a participant in a group health insurance policy issued by defendant to plaintiff's former employer Bernard's Northtown, Inc. to provide benefits including long-term disability benefits to participants. "[B]y its express terms, ERISA encompasses welfare plans provided through the purchase of insurance." *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 183 (6th Cir. 1992) (construing 29 U.S.C. § 1002(1)). It is "common practice" for employers to establish plans that provide disability benefits to their employees through the purchase of a group health insurance policy from a commercial insurance company. *Id.* (citing *Metro. Life*, 471 U.S. at 727). Accordingly, plaintiff's breach of contract cause of action falls under the preemption clause.

The second preemption-related clause is the "saving clause." The saving clause excepts from the preemption clause any law that "regulates insurance." 29 U.S.C. § 1144(b)(2)(A). For a law to "regulate[] insurance" it must be specifically directed towards the insurance industry. *Pilot Life*, 481 U.S. at 50. For example, in *Rimes v. State Farm Mutual Automobile Insurance Co.*, the Wisconsin Supreme Court held that under Wisconsin subrogation law an insurer cannot share in the recovery from a tortfeasor if the total amount recovered by the insured from the insurer and the wrongdoer does not cover the insured's entire loss. 106 Wis. 2d 263, 316 N.W.2d 348 (1982), *cited in Perto*, 148 Wis. 2d at 727, 436 N.W.2d at 876; *see also*

Paulson v. Allstate Ins. Co., 2003 WI 99, 263 Wis. 2d 520, 665 N.W.2d 744. This equitable principle is specifically directed at the insurance industry. Accordingly, it is saved from preemption as a law that regulates insurance.

To the contrary, a cause of action for breach of contract is not specifically directed towards the insurance industry. *Pilot Life*, 481 U.S. at 50. Accordingly, the saving clause does not apply to plaintiff's breach of contract cause of action. Plaintiff's breach of contract cause of action is preempted by ERISA.

The third preemption-related clause is the "deemer clause." The deemer clause clarifies that state laws which purport to regulate insurance companies may not deem an employee benefit plan to be an insurance company. 29 U.S.C. § 1144(b)(2)(B). In other words, employers who provide disability benefits through plans that are funded through employer/employee contributions rather than through purchased private insurance ("self-funded plans") are exempt from state laws that regulate insurance. *Smith v. Blue Cross & Blue Shield*, 959 F.2d 655, 657 (7th Cir. 1992). In *Perto*, the Court found that the plan could not be "deemed" to be an insurance company because the plan was a self-funded plan. 148 Wis. 2d at 728, 436 N.W.2d at 876. Consequently, the plan was exempt from the subrogation limitation announced in *Rimes*. *Id.*

The deemer clause has no application to plaintiff's breach of contract cause of action. First, plaintiff's breach of contract cause of action does not purport to regulate insurance. Second, defendant is an insurance company; the deemer clause prevents entities that are not insurance companies from being deemed to be insurance companies for state regulatory purposes.

ORDER

IT IS ORDERED that defendant's motion to dismiss plaintiff's state law cause of action is GRANTED.

IT IS FURTHER ORDERED that plaintiff's second cause of action is dismissed without prejudice.

Entered this 2nd day of February, 2004.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Elvis Kobs
65 County Road M
Star Prairie, WI 54026

Plaintiff,

v.

United Wisconsin
Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

Case No: 04-C-0005-S

Assigned Judge:
John C. Shabaz

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

(Filed Apr. 26, 2004)

TO: Theresa Owens
Clerk of District Court
U.S. Courthouse
120 North Henry St.,
Rm 320
Madison, WI 53703

Jason Whitley
Attorney for Plaintiff
Novitzke, Gust, Sempf
& Whitley
314 Keller Ave No., Ste 399
Amery, WI 54001

PLEASE TAKE NOTICE that Defendant, United Wisconsin Insurance Company ("UWIC"), by and through its attorney, Carol L. Dorner, hereby moves this Court for a Protective Order preventing the Plaintiff from conducting depositions in this matter, because such discovery is beyond that which is permissible under an arbitrary and capricious standard of review under the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. § 1001 et seq. ("ERISA"). Further, even if the Court should find that the Plaintiff can obtain discovery beyond the

administrative record in this case, the Court should still find that the Plaintiff did not provide reasonable notice to UWIC of his request to depose a UWIC employee before May 4, 2004.

This motion is supported by UWIC's Brief in Support of its Motion for a Protective Order and Affidavit of Carol L. Dorner submitted herewith and all pleadings on file.

WHEREFORE, Defendant UWIC respectfully requests that the Court enter a Protective Order precluding Plaintiff from conducting discovery depositions in this case.

Dated this 23rd day of April, 2004.

UNITED WISCONSIN INSURANCE COMPANY

By: /s/ Carol L. Dorner
Carol L. Dorner
State Bar. No.: 1032239

P.O. ADDRESS
401 West Michigan Street, WOC10
Milwaukee, WI 53203-2804
Phone: (414) 226-6930
Facsimile: (414) 226-6229

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Elvis Kobs
65 County Road M
Star Prairie, WI 54026

Plaintiff,

Case No: 04-C-0005-S

v.

Assigned Judge:
John C. Shabaz

United Wisconsin
Insurance Company
P.O. Box 2013
Milwaukee, WI 53201-2013

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER

(Filed Apr. 26, 2004)

INTRODUCTION

The Plaintiff originally commenced this action in Polk County Circuit Court in November 2003. Defendant United Wisconsin Insurance Company ("UWIC") removed the case to this Court on the basis of preemption of the Plaintiff's state law causes of action by the Employee Retirement Income Security Act of 1974 ("ERISA").

UWIC filed a motion for summary judgment on or about April 1, 2004. The Plaintiff requested and was granted an Enlargement of Time in which to file a response brief, in part, because the Plaintiff's counsel, Mr. Whitley, seeks to depose a UWIC employee. UWIC objects to such deposition because under an arbitrary and capricious standard of review of a benefit determination under

an ERISA plan, the scope of discovery is limited to the administrative record. Pursuant to F.R.C.P. 26(c)(1) UWIC moves for a protective order preventing the Plaintiff from conducting depositions and limiting discovery in this matter to the administrative record. Further, even if the Court finds that the Plaintiff can obtain discovery beyond the administrative record in this matter, it should still deny the Plaintiff's request for a deposition to be scheduled prior to May 4, 2004, because UWIC has not received reasonable notice.

FACTS

The background facts in this case have been previously set forth in the parties' briefs on file with the Court. Further, it has been established in the Court's Memorandum and Order of February 2, 2004, that the group disability insurance policy at issue in this matter qualifies as an "employee welfare benefit plan" as that term is defined in ERISA.

During the parties' 26(f) conference on January 20, 2004, the Plaintiff's counsel, Mr. Whitley, indicated that he would request the deposition of a UWIC employee subsequent to his receiving UWIC's administrative file. Dorner Aff. ¶ 4. At that time, UWIC's counsel advised Mr. Whitley that UWIC would object to depositions because discovery in this case is limited to the administrative file under ERISA's arbitrary and capricious standard. Dorner Aff. ¶ 4. This was documented in the parties' Joint 26(f) Report dated January 27, 2004, and on file with the Court. Dorner Aff. ¶ 4.

UWIC provided the Plaintiff with its initial disclosures on February 2, 2004. Dorner Aff. ¶ 6. On February

19, 2004, UWIC provided the Plaintiff with its answer to the Plaintiff's Demand to Produce and documents from UWIC's administrative file, with the exception of medical records which Mr. Whitley had not requested. Dorner Aff. 7. Based on these disclosures, the Plaintiff would have been aware that Constance DuBose was a UWIC employee involved in the review of the Plaintiff's claims. Dorner Aff. ¶¶ 6, 7.

It was not until April 22, 2004, that Mr. Whitley's office contacted UWIC via telephone to request that the deposition of Constance DuBose be scheduled prior to May 4, 2004. Dorner Aff. ¶ 8. No written notice of deposition has yet been received by UWIC. Dorner Aff. ¶ 8.

Additional facts will be set forth in the Argument section as necessary.

ARGUMENT

I. UNDER THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW THE PLAINTIFF IS NOT ENTITLED TO DISCOVERY BEYOND THE ADMINISTRATIVE RECORD; THEREFORE, THE DEPOSITION SOUGHT BY THE PLAINTIFF IS NOT A VALID GROUND OF INQUIRY IN THIS MATTER.

A. An Arbitrary And Capricious Standard Of Review Applies To This Court's Review Of UWIC's Benefit Denial.

The standard for judicial review of benefit determinations under ERISA plans depends primarily upon the language of the employee welfare benefit plan at issue. The Supreme Court, the Seventh Circuit and this Court have all held that if the plan's language confers discretionary

authority upon the plan administrator or fiduciary to determine eligibility for benefits or to construe the terms of the plan, then the courts will apply the deferential arbitrary and capricious standard of review. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L. Ed. 2d 80 (1989); *Wilczynski v. Kemper Nat'l Ins. Co.*, 178 F.3d 934, 935 (7th Cir. 1999); *Chojnacki v. Georgia-Pacific Corp.*, 108 F.3d 810, 814 (W.D. Wis. 1997). Where the plan's language fails to confer discretionary authority, the courts will apply a *de novo* standard. *Id.*

"No magic words are required to confer discretion on an administrator." *Chojnacki*, 108 F.3d at 815; *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000). However, the Seventh Circuit has drafted the following "safe harbor" language, the use of which shall trigger the arbitrary and capricious standard of review:

> Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them.

Herzberger, 205 F.3d at 331.

In the case at bar, the employee welfare benefit plan (the "Plan") that was maintained by the Plaintiff's former employer, Bernard's Northtown, Inc. ("Bernard's Northtown"), and insured by UWIC and under which the Plaintiff seeks benefits contains the following provision:

> **BENEFIT DETERMINATION**
>
> Benefits under this policy will be paid only if United Wisconsin Insurance Company decides *in its discretion* that the Insured is entitled to them.

UWIC's Brief in Support of its Motion to Dismiss, Ex. A, p. 6 (emphasis added). This Plan language clearly parrots

that of the Seventh Circuit's "safe harbor" and expressly confers discretionary authority concerning benefit determinations to UWIC. Thus, the arbitrary and capricious standard of review applies to this Court's review of UWIC's denial of benefits.

B. Under The Arbitrary And Capricious Standard Of Review, Discovery Is Limited To The Administrative Record.

Under the highly deferential arbitrary and capricious standard of review, consideration of evidence by the court is limited only to that which was submitted to the plan's administrator at the time the claims decision was rendered. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999) (finding that the district court erred in allowing discovery beyond the administrative record); *Winters v. UNUM Life Ins. Co. of Am.*, 232 F.Supp.2d 918, 927 (W.D. Wis. 2002). "Deferential review of an administrative decision means review on the administrative record." *Perlman*, 195 F.3d at 981-982. Inquiry into the thought processes of the administrator's staff, the training of those who considered the plaintiff's claims "and in general who said what to whom within [the administrator]" goes beyond that which is allowed under a deferential review. *Id.* The Seventh Circuit has not allowed parties to take discovery into the mental processes of the administrator's personnel in cases where an arbitrary and capricious standard governed. *Id.* at 982. Moreover, if a party desires to add to the administrative record evidence that the plan administrator has not reviewed in relation to the benefit determination, the appropriate remedy is for the court to remand the case to the administrator for another determination. *Wardle v.*

Central States Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 101 S.Ct. 922 (1981).

On February 2, 2004, UWIC provided the Plaintiff with its initial disclosures pursuant to F.R.C.P. 26(a)(1). Dorner Aff. ¶ 6. On February 19, 2004, UWIC provided the Plaintiff with a copy of the administrative record pertinent to the Plaintiff's claims, other than medical records for which the Mr. Whitley has made no request. Dorner Aff. ¶¶ 3, 7. UWIC has also answered the Plaintiff's related Demand to Produce based on the administrative record. Dorner Aff. ¶ 7. As a result of these disclosures, the Plaintiff would have been aware of the involvement of UWIC's employee Constance DuBose in the review of the Plaintiff's claims. Dorner Aff. ¶ 7.

On April 22, 2004, Mr. Whitley's office contacted UWIC telephonically to schedule the deposition Constance DuBose prior to May 4, 2004. Dorner Aff. ¶ 8. However, the mental processes of Ms. DuBose or any other UWIC employee involved in the review of the Plaintiff's claims are not legitimate grounds of inquiry under the applicable arbitrary and capricious standard of review. Clearly, discovery through a deposition would examine the thought processes of the deponent and would expand the scope of discovery well beyond the administrative record.

Therefore, an Order prohibiting the Plaintiff from conducting such deposition is warranted. Further, if the Plaintiff wishes to add to the administrative record, this Court should remand this case to UWIC for another review and determination concerning the Plaintiff's claims.

II. EVEN IF THE COURT WOULD DETERMINE THAT A DEPOSITION IS WARRANTED, UWIC HAS NOT HAD REASONABLE NOTICE SUCH THAT IT SHOULD BE UNDULY BURDENED TO SCHEDULE SUCH DEPOSITION PRIOR TO MAY 4, 2004.

Even if the Court should determine that the Plaintiff can obtain discovery beyond the administrative record in this case, UWIC is still entitled to reasonable notice of depositions pursuant to F.R.C.P. 30(b)(1). The Plaintiff has failed to provide reasonable notice of his verbal request to depose Constance DuBose before May 4, 2004.

In this case, UWIC put both the Plaintiff and the Court on notice of its position that it would object to depositions in this matter as early as January 20, 2004, during the parties' 26(f) conference and in the parties' Joint Rule 26(f) Report dated January 27, 2004. Dorner Aff. ¶ 4. This was also documented in UWIC's Preliminary Pretrial Conference Report dated January 21, 2004. Dorner Aff. ¶ 5.

Mr. Whitley was provided with UWIC's initial disclosures on or about February 2, 2004, which included the name of Constance DuBose. Dorner Aff. ¶ 6. Further, Mr. Whitley would have been aware of Ms. DuBose's review of the Plaintiff's claims as found within the administrative file documents produced by UWIC on February 19, 2004. Dorner Aff. ¶ 7. The fact that Mr. Whitley's office did not request the deposition of Ms. DuBose until April 22, 2004, and then further requested that such deposition be scheduled prior to May 4, 2004, is not reasonable notice to UWIC.

The Plaintiff has been aware for three months that UWIC would object to depositions in this matter. The

Plaintiff has further been aware for two months of Ms. DuBose's involvement in the review of the Plaintiff's claims at issue. Therefore, it is unreasonable for a deposition request be made upon UWIC and its employee with less than two weeks' notice. Further, because I am in-house counsel and currently handling the workload of another attorney who is on a medical leave, it would be unreasonably burdensome to my schedule to arrange for a deposition within the next six working days. Dorner Aff. ¶ 2.

CONCLUSION

For all of the reasons set forth above, the Court should grant Defendant's Motion and enter a Protective Order prohibiting the Plaintiff from conducting depositions and limiting discovery in this case to the administrative record. Even if the Court should find that discovery can be obtained by the Plaintiff beyond the administrative record, the Court should still find that the Plaintiff's request to depose Constance DuBose prior to May 4, 2004, is unduly burdensome to UWIC and is not based upon reasonable notice.

Dated this 23rd day of April, 2004.

UNITED WISCONSIN
INSURANCE COMPANY

By: /s/ Carol L. Dorner
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ELVIS KOBS, **Civil 04-C-0005-S**

Plaintiff,

v.

UNITED WISCONSIN INSURANCE COMPANY

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS SECOND MOTION TO CONTINUE DEFENDANT'S SUMMARY JUDGMENT MOTION FOR ENLARGEMENT OF TIME TO REPLY TO DEFENDANT'S SUMMARY JUDGMENT MOTION and TO COMPEL DEPOSITION DISCOVERY and in OPPOSITION TO DEFENDANTS MOTION FOR PROTECTION

The Defendant, Elvis Kobs, through his attorneys, Novitzke, Gust, Sempf & Whitley, by Jason W. Whitley, have moved the court for the following relief:

1. Continuance of the Defendant's Summary Judgment Motion Hearing and Enlargement of time in which to respond to Defendant's Motion for Summary Judgment and for an order to compel the Defendant to produce witnesses for depositions.

The plaintiff files this memorandum of law in support of his requests.

The Defendant has filed a Motion for Summary Judgment requesting certain relief including total dismissal of Plaintiff's claims.

Pursuant to FRCP 56(f) a Court may issue an order for a continuance to permit the party opposing summary judgment to obtain depositions or allow further discovery in order that the opposing party may effectively oppose the moving the party.

In the represent matter, the Plaintiff cannot effectively oppose the Defendant's Motion for Summary Judgment until the Plaintiff has answers to certain essential facts regarding the character and nature of the Defendant's insurance policy, as well as the underlying facts regarding the Defendant's handling of the Plaintiff's application for disability insurance benefits. These facts are essential in determining whether the Defendant is entitled to protections afforded by the Employee Retirement Income Security Act (ERISA) of 1975.

The Plaintiff needs to learn what information was available to the Defendant at the time Plaintiff made his request for insurance disability benefits and also the manner in which the Defendant handled and processed that claim subject to the terms and provisions of its own policy. In addition, the Plaintiff needs to know whether the Defendant, in denying the Plaintiff's claims for insurance benefits, acted in a dual capacity as both insurer of the Plaintiff and the Administrator of the plan or the policy covering such a plan. This information is necessary to determine the proper standard of review because the defendant is claiming that its coverage decisions are subject to the strict arbitrary and capricious standard which properly only applies to plan administrators. Here,

the defendant does not appear to be an not an administrator but rather a mere insurance company.

Pursuant to *Firestone Tire and Rubber Co. v Bruke,* 489 U.S. 101, 115 (1989), if an insurance company acts in a dual capacity which places that insurer in a perpetual conflict as to both the insurer and interpreter of the plan, then the proper standard of review is de novo. *Id.* In the present matter is appears from the administrative record that and defendant's position on summary judgment that the defendant has acted in a dual capacity thus requiring a de novo standard of review. However, additional discovery by way of deposition needs to be conducted.

At the present time, the Plaintiff is unable to determine whether United Wisconsin acts as the insurer, interpreter, and the administrator of Mr. Kob's insurance policy and therefore, it is unable to determine the correct standard of review.

This is an important matter because the Defendant's Summary Judgment Motion requests a determination that the standard of review is arbitrary and capricious. It is impossible for Plaintiff to respond to the Defendant's Motion in that regard unless the Plaintiff can determine the various procedures followed by United Wisconsin Company in reviewing and refusing Mr. Kobs's insurance claim.

The proper standard of review is of great importance in ascertaining whether an insurer wrongfully denied benefits under a benefits policy. Plaintiff must be able to conduct necessary discovery before he can effectively proceed on those issues.

Therefore, because the Plaintiff cannot properly defend against Defendant's Motion for Summary Judgment without obtaining certain necessary discovery material.

Dated this 5th day of May, 2004.

/s/ Jason W. Whitley
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SUMMARY OF NEUROPSYCHOLOGICAL EVALUATION

Patient's Name:	**KOBS,** Elvis Kevin
Medical Record #:	**0050132702**
Date of Evaluation:	August 22, 2002
Referring Physician:	Neal Melby, M.D. New Richmond Clinic New Richmond, WI

I. REASON FOR REFERRAL

Mr. Kobs, a 51-year-old, right-handed man, was evaluated for documentation of his cognitive baseline in the setting of his complaints about his memory. Mr. Kobs suffered what sounded like a mild closed head injury in 1999, followed by a fall from a roof onto his left side which spared his head this past January. Mr. Kobs, according to office notes from Dr. Melby, began complaining about memory loss after the fall from the roof. He subsequently was referred to a neurologist, John Floberg, M.D., for follow-up of his complaints. According to Dr. Melby's, not Dr. Floberg's notes, Dr. Floberg did an MRI scan of his head and found some sort of abnormality in the right

frontal lobe that he reportedly thought was incidental, e.g., not related to Mr. Kobs's complaints about his memory. According to the same set of notes, Dr. Floberg thought that Mr. Kobs's memory complaints were due at least in part to depression, although according to the notes, Mr. Kobs disagreed with Dr. Floberg, since he thought his memory problems were worsening. Mrs. Kobs reported to this examiner that her husband's short-term memory loss has become progressively worse since 1999 when he hit his head at work. Mr. Kobs reported that he is in the process of applying for long-term disability after being fired from his job in May of this year. He has hired an attorney to aid him in establishing disability status.

II. RELEVANT HISTORY

History of Presenting Complaint: Mr. Kobs was accompanied to the evaluation by his wife Donna, who often interjected details about Mr. Kobs's history. Mr. Kobs reported that in 1999 he hit his head on the corner of a steel filing cabinet at work. He reportedly opened a door inward into a room to talk to someone in the room, leaned in forcefully with his head after closing the door and reopening it because the person was still speaking to him, then struck the left front of his head on a corner of the cabinet. He reportedly held onto the doorknob because he went right to his knees. He immediately experienced dizziness and headaches, went to the bathroom and threw up, but was not knocked unconscious. He reported that the skin on his fore head broke where he had hit it on the cabinet, it bled, and the area eventually turned black and blue. He did not seek any medical attention the day he hit his head, reportedly because he had to work. After working the entire day the next day, he went to the hospital because

his head was hurting so badly and he was sick to his stomach. He reportedly did not remember what was done to work up his complaints. He could not recall having been given pain medication. However, he started going to a chiropractor for the headaches; the treatment brought only temporary relief.

Regarding the memory loss he reportedly experienced after he hit his head, he reported that at work his general manager kept giving him sly (Mr. Kobs used the word "slide") comments that he, the manager, could match Mr. Kobs's brain any day. Mr. Kobs reported that he did not understand where his general manager was "coming from," since he has reportedly had twenty-six years of experience as a business manager, and "never, ever made any mistakes in [my] life as far as [my] work." Mr. Kobs reported that subsequent to the incident, he started having to take a lot of notes at work. He reportedly used to deal with twenty or more banking institutions and could remember their fax and phone numbers, but started having to look the numbers up in his computer. He reportedly recently went to town and could not remember his home phone number, so he went to his daughter's to ask her. He commented, "I want to know why this is happening." Mrs. Kobs reported that her husband's short-term memory is getting worse and worse, but his long-term memory is fine. When Mr. Kobs was asked about his ability to pay attention, he denied any problems, but Mrs. Kobs reported that he "almost just doesn't get it." Mrs. Kobs also reported that she has to write out the checks because "he forgets." Mr. Kobs, however, reported that he has cashed in his 401K and brought his first and second mortgages up to date.

In January of this year, Mr. Kobs was taking Christmas decorations down from the roof of his granddaughter's house while standing on one side of the peak when he lost his balance and fell. Mrs. Kobs reported that he fell backward off of a ladder, but Mr. Kobs implied that he was standing on the peak of the roof when he lost his balance and fell. In any case, he reportedly fell thirty-five feet onto concrete and landed on his left side. He reportedly chipped his rotator cuff on the left, injured his left knee, injured his left wrist and fractured his left hand. He denied that he hit his head. Reportedly, he was hospitalized for a long time after the fall, and he was kept stationary because of the fear of blood clots forming in his leg. He had no surgery after the fall, but according to the notes from Dr. Melby, he complained about the knee's not being able to support his weight. He was also complaining of neck and low back pain. According to notes from the orthopedic surgeon, Thomas V. Reiser, M.D., of Midwest Spine & Orthopaedics, MRI scan of his lumbar spine done in April, 2002 revealed degenerative disc disease at L3 through L5 without herniation, mild stenosis at L3-L4 and L4-L5, and a small central herniation of "questionable significance" at L5-S1. MRI scan of the cervical spine in March, 2002, revealed mild degenerative disc disease at C3-C4 and herniation at C5-C6, according to notes from Dr. Reiser. Dr. Reiser commented that he thought the pain he was experiencing was due to an aggravation of pre-existing disc disease.

According to Dr. Melby's notes, Mr. Kobs sustained a torn horn of the meniscus medial compartment in a fall, which fall is unclear since he had fallen at work and he fell from the roof. This tear was subsequent to arthroscopy and

meniscectomy done in the fall of 2001 because of pre-existing complaints about his knee. After the surgery, he continued to complain that his knee felt unstable. He was referred back to Dr. Engelking, the surgeon, told to continue with his knee brace, and given Paxil and analgesics. Notes from Dr. Engelking were not available, but apparently after all of this, he fell from the roof. Subsequent to the fall, Mr. Kobs experienced chronic edema in that leg and examination for deep vein thrombosis was undertaken by Dr. Melby, with negative results.

Of interest were the notes from Dr. Reiser dated December 28, 1999. Mr. Kobs was reporting "symptoms of neck pain, headaches, upper back pain and bilateral shoulder/arm paint to the elbow, with numbness and tingling in his hands." Mr. Kobs reported to Dr. Reiser that three to four months prior to the date of the visit, he was sitting at his desk and bent over to get into a lower drawer when he immediately felt low back pain. He received films of his lumbar spine and was prescribed pain medication. Mr. Kobs also reported to Dr. Reiser that in September of 1999, he "ran into a steel cabinet at work and sustained a bruise to the head. He sought treatment at Holy Family Hospital ER, for neck pain, nausea, and headaches." He was prescribed pain medication. He then continued treatment with Dr. Melby for neck pain, upper back pain, and radiating low back pain. His right leg reportedly was giving out. After obtaining from Mr. Kobs localization of the pain, description of the pain, pain rating, aggravating factors, alleviating factors, and factors affecting his sleep, Dr. Reiser obtained the history from the patient that a year ago, he slipped on the ice at work. He immediately felt neck pain and low back pain, sought treatment with

Dr. Melby for three to four months, then reportedly experienced a complete recovery. He also reportedly told Dr. Reiser that after the head injury at work in September of 1999, he continued treatment with Dr. Melby for his neck pain, upper back pain, and his low back pain. After more history-taking and a very thorough examination, Dr. Reiser concluded that Mr. Kobs had "multiple level degenerative disc disease with mechanical lower back pain regarding the lumbar spine." He also "suspect[ed] degenerative disc disease of the cervical spine and chronic mechanical pain." Dr. Reiser recommended physical therapy.

Psychosocial History: Mr. Kobs reported that he was married before and had three children from his first marriage. Donna, his wife, was also married before with three children from that marriage. Then he and Donna had their own child – for a total of seven children. Mr. Kobs reported that he married his first wife at age sixteen because she was pregnant. They were married in Canada, reportedly the only place where they could get married. Just immediately before or after deciding to leave his first wife, she became pregnant with their third child. He reportedly met Donna and then they had a child – Shantel, age twenty-five. His third son by his first wife was born after Mr. Kobs left. This son is also twenty-five years old. His other two children from his first wife are reportedly thirty-two and twenty-eight. However, if he was married at age sixteen and his wife pregnant at the time, then Mr. Kobs would only be forty-nine.

When asked how he spends his time currently, Mr. Kobs reported that he does his exercises three times per day, uses the whirlpool twice a day, watches the news, walks his circular driveway for exercise, and cruises his pontoon

boat around the lake. He also reported that finances are becoming a source of stress for him right now. He was on short-term disability, then was fired from his job on May 21st of this year. Dr. Melby has deemed him unemployable, both by Mr. Kobs's report and in a note by Dr. Melby. However, long-term disability has been denied him until the insurance company receives the results of this evaluation. He has reportedly not gotten a check for seven or eight months. Mrs. Kobs reportedly had breast cancer and both breasts were removed, is an insulin-dependent diabetic, has been diagnosed with lupus, and is on disability because of the breast cancer. They reported that their children are helping out by doing housework, buying groceries and offering some financial support. Mr. Kobs also reported that his father died of cancer approximately nine years ago, and his mother is still alive and in good health at age 69. She reportedly works at Turtle Lake Casino in the Housekeeping Department.

Developmental, Educational, and Occupational Histories: Mr. Kobs reported that he was born in New Richmond, WI and that his birth was normal. His mother reportedly had him when she was seventeen. At the age of five, he reportedly contracted polio. He was reportedly paralyzed in his legs and on the left side, but could still use his right arm. He was in the hospital for a year at Sister Kenny. Reportedly, doctors told him he would never walk again. His feet are reportedly deformed, according to Mrs. Kobs, but he denied that he has any leg wasting. He also reportedly not only learned to walk again, but took third place in a regional track meet when he was in the third grade.

He denied any developmental delays and added that he was advanced in talking, crawling and walking. He reported

that he started school at the usual time, apparently despite having had polio at age five. He reported that he went to high school in Glenwood, Illinois, and graduated from high school in LaSalle, IL. He then finished two years of college at Boston College. When asked why he quit, he reported that he got into "the car and people business." He reported that he really enjoyed the challenge of financing people who could not otherwise get financing. He reportedly tried to enlist in the Air Force at the age of seventeen or eighteen, but was turned down because of the history of polio.

Mr. Kobs reported that he had worked for eight years at the company which fired him in May. This company – a car dealership – reportedly did not have a leasing and finance department until Mr. Kobs started one and built it up. Prior to this he spent thirteen years at another dealership on the East coast in Massachusetts. He also worked for Anderson Windows in Bayport, MN before the job in Massachusetts. He reported that before he went on short-term disability he was earning an average of eighty thousand dollars or more per year. He reported that long-term disability was supposed to provide payments of about $4,000 per month.

Past Medical History: Mr. Kobs, as noted above, has had surgery on his left knee to repair a torn meniscus that was not related to the fall from the roof. He has also reportedly had gallbladder surgery. He reportedly suffered a heart attack thirteen years ago that damaged the lower left ventricle of his heart. He recently underwent left heart catheterization, angiography, and left ventriculogram because of complaints of chest pain, shortness of breath and radiation to his jaw and right arm in June of this year. He denied any history of stroke or closed head injury in addition to bump on his head from the filing cabinet. As

noted above, there is a history of polio at the age of five. Mr. Kobs had not brought the list of his medications, but between him and Mrs. Kobs, they recalled that he was taking Effexor, Celebrex, Prevacid, Lipitor, Plavix (Mr. Kobs recalled the name of this medication), and Tylenol. According to the report on the heart work-up in June of this year, he was also prescribed nitroglycerin. Mr. Kobs then reported that he is taking Clonazepam for his "crawly legs."

Mr. Kobs denied that he drinks, but reported that he smokes about a pack a day, sometimes more, sometimes less, and that he used to smoke four packs a day. Donna, his wife, also reported that they like to have a Bloody Mary together once in a while. Mr. Kobs reported that the Effexor works very well and he is not depressed. From Dr. Melby's notes it was gleaned that he has a somewhat long-standing history of complaints about depression. However, Mr. Kobs denied that he was depressed before his wife was diagnosed with cancer. After the diagnosis, he reportedly saw both a psychologist and a psychiatrist and was put on Effexor recently. He commented that she, Donna, is his life and that he thought he was going to lose her many times.

At the end of the interview, Mr. Kobs reported that he knows he is not himself because he was very outgoing. He reportedly could give speeches in front of people and know what he was talking about. He became tearful when he said that now he would not make sense. He commented that he is very intelligent but he frustrates his wife because he does not remember. More will be said about affect and personality functioning in the next section.

III. EVALUATION

Intellectual Performance: Mr. Kobs was administered the Wechsler Adult Intelligence Scale-third Edition (WAIS-III)

in order to obtain a measure of overall level of intellectual functioning. On the WAIS-III he performed within the low average range overall. His WAIS-III Full Scale IQ was 80 (low average), his Verbal IQ was 88 (low average), and his pro-rated Performance IQ (based on four rather than five subtests) was 76 (borderline). IQ index scores such as these have a mean of 100 and a standard deviation of 15. Scores ranging from 80-89 are in the low average range, from 90-109 are in the average range, and from 110-119 are in the high average range. Verbal subtests tap performance on a range of verbal knowledge and verbal reasoning tasks and on attention, working memory, and mental arithmetic tasks. Performance subtests tap performance on a range of timed and untimed visual reasoning and visual-motor tasks. Age-adjusted scaled scores are given below, they have a mean of 10 and a standard deviation of 3, with scores of 8 through 12 defining the limits of average.

Wechsler Adult Intelligence Scale-third Edition (WAIS-III)

Verbal	Age-Adjusted Scaled Score	Performance	Age-Adjusted Scaled Score
Vocabulary	7	Picture Completion – not administered	
Similarities	7	Digit Symbol-Coding	5
Arithmetic	7	Block Design	7
Digit Span	8	Matrix Reasoning	9
Information	8	Picture Arrangement	4
Comprehension	11		
(Letter-Number Sequencing)	(8)		

A discussion of these results is integrated into the discussion of performance in each of the cognitive domains below. The number in parentheses refers to a score not averaged into the IQ index score.

Attention/Concentration: Mr. Kobs was fully oriented, except for incorrectly recalling the day of the week. He correctly recalled the names of the current U.S. President, the President who preceded Bush, and the Governor of Minnesota. He could not recall the name of the current Vice President. He attended to all questions and instructions. The level of effort exerted was not thought consistent with what might be expected, given his high level of education (two years of college at an excellent private school in Boston) and all of his reported occupational attainments. In short, Mr. Kobs was not thought to be motivated to perform to the best of his ability, as for example, on IQ testing. This questionable level of effort and involvement in the testing were thought part of larger motivational and personality issues. More will be said about this in the section on Behavior and Personality Functioning, and in the summary of this report. His performance on a task requiring the repetition of series of single digits both forward and backward was in the low average range for age (WAIS-III Digit Span). He correctly repeated one series of six digits forward and two series of four digits backward. On a task requiring the mental solution of orally presented arithmetic word problems under timed conditions, his performance was below average for age (WAIS-III Arithmetic). Performance on a more complex sequencing task requiring him to repeat series of alternating numbers and letters in separate ordered sequences of first numbers followed by letters was within the low average range for age (WAIS-III Letter-Number

Sequencing). Finally, his performance on a spatial working memory task requiring him to learn the associations between four plain white cards in a row and a two-dimensional spatial array of four disks, e.g., which card went with which disk, through trial and error and examiner feedback, was mildly to moderately impaired with respect to the number of errors made, and moderately impaired with respect to the number of trials needed reach the criterion of twelve consecutive correct associations (Petrides Conditional Associative Learning). In fact, Mr. Kobs did not reach that criterion.

Speech/Language: Mr. Kobs spoke grammatically and logically, articulated clearly, and understood all questions and instructions. He occasionally made word substitution errors, such as substituting "slide" for sly. He also occasionally phrased a sentence awkwardly, such as when he said he "financed people" in his business, meaning that he got financing for people unable to get financing to purchase a car. Ideas followed sequentially. Formal knowledge of word meanings was below average for age (WAIS-III Vocabulary). Performance on a verbal reasoning task requiring the generation of higher level verbal abstractions was also below average for age (WAIS-III Similarities). His fund of general knowledge of history, science, religion, geography, and literature was within the low average range for age. (WAIS-III Information). Performance on a common-sense verbal reasoning task requiring social judgement and proverb interpretation, was solidly average for age (WAIS-III Comprehension). Letter fluency, the generation of words to selected letters of the alphabet under timed conditions, was below average to mildly impaired, for age and gender. Confrontational naming was solidly average for age (Boston Naming Test).

Visual-Spatial/Visual-Perceptual Performance: Performance on a visual-spatial reasoning task requiring the construction of two-dimensional block designs from a model was below average for age (Block Design). Performance on a visual information processing and abstract reasoning task requiring him to complete a visual array or finish a sequence using a rule derived from the pattern was also within the average range for age (Matrix Reasoning). Performance on a pictorial sequencing task requiring ordering a series of pictures creating a brief story into a logical, temporally correct sequence was mildly to moderately impaired for age (Picture Arrangement). Mr. Kobs got one item correct on this task. His copy of a complex geometric design was in the range of severely impaired for age (Rey Complex Figure – copy), because Mr. Kobs made a series of minor errors which cost him a number of points. These errors were largely omission errors, including not drawing the fifth of five lines, and omitting small details such as the single line above the small rectangle and the horizontal line within the large triangle which is a continuation of the horizontal midline. He also incorrectly placed the diamond on a line extending out from the tip of the large triangle on the right side of the figure. The small square in the lower left quadrant was drawn wider than the small rectangle inside the central figure.

Visual Memory: His immediate recall and delayed retrieval performances, that is, drawing the complex figure copied earlier from memory after three minutes and thirty minutes, were solidly within the average range with respect to immediate recall, and mildly below average with respect to delayed retrieval, for age (Rey Complex Figure – recall). Delayed recognition requiring the identification and discrimination of parts of the original design from

parts of other designs was mildly impaired for age. The pattern of retrieval vs. recognition (e.g., immediate retrieval, below average delayed retrieval and mildly impaired recognition) was consistent with a "storage" pattern. His performance on an incidental learning task requiring him to draw the symbols of the WAIS-III Digit Symbol task from memory after transcribing them was within the low average range with respect recall of the symbol-number pairings, and below average to mildly impaired with respect to free recall of the symbols (WAIS-III Digit. Symbol – Incidental Learning: Pairing and Free Recall).

Verbal Memory: Performance on a word-list learning and retrieval task requiring recall of words from four categories on each of five learning trials ranged from solidly average to mildly impaired for age and gender (California Verbal Learning Test). Learning over trials ranged from below average on the first trial to mildly impaired on the last trial. His learning curve essentially leveled off after the second trial. The sum total of words recalled was mildly below average. Uncued and cued retrieval after both the presentation of a second list of words (a distraction task) and after a longer delay interval was mildly impaired (two standard deviations below the mean) for age and gender. Delayed recognition of words from the original list was moderately to severely impaired (four standard deviations below the mean for age and gender), while his ability to discriminate list words from other words was mildly impaired. Immediate recall and delayed retrieval of narrative information, e.g., brief paragraphs, were within the average range for age (Wechsler Memory Scale-third edition [WMS-III] Logical Memory I & II). The percentage

of information retained over the delay interval was solidly average for age.

Psychomotor Performance: Speed of performance on a visual scanning and numerical sequencing task was mildly below average for age and gender, with two errors spontaneously corrected (Trail Making Part A). On another visual search task requiring numerical and alphabetical sequencing in alternating order, speed of performance was moderately impaired for age and gender, with one error and no confusion (Trail Making Part B). On still another visual search and symbol substitution task requiring the transcription of symbols under timed conditions, speed of performance was below average to mildly impaired (WAIS-III Digit Symbol).

Motor Performance: Finger-tapping speeds were solidly average with the preferred hand and above average with the non-preferred hand. Upper-extremity, fine, visual-motor speed and control (e.g., grooved peg manipulation) were mildly impaired with the preferred hand and moderately impaired with the non-preferred hand, for age and gender. Mr. Kobs followed directions perfectly on this task.

Executive Functioning: Performance on a nonverbal reasoning and concept formation task requiring the successive generation and utilization of problem-solving principles (color, form, or number) as well as sustaining the use of the principle or changing it in response to examiner feedback ranged from mildly to moderately impaired to below average, for age and level of education (Wisconsin Card Sorting Test). Mr. Kobs demonstrated a tendency to sort cards to some principle other than the most obvious and appropriate ones. Thus, the non-perseverative error rate, or the rate at which he made

errors not pertaining to previously correct principles was in the range of mildly impaired. Otherwise, the numbers and percentages of perseverative errors and perseverative responses were mildly below average. Conceptual level responding, or the number of three or more consecutive correct responses divided by the total number of responses, was also mildly below average. He used each of the three principles ten consecutive times, e.g., the number of categories completed was three, and in the range of mildly impaired. Of some interest was that Mr. Kobs lost set five times, e.g., failed to continue to use the correct problem-solving principle despite having just used it a minimum of five times. This is a highly unusual pattern of performance suggesting extreme distractibility (he did not seem distracted), confusion, or resistance to the task. He also did not appear to benefit from experience with the task, but it is unclear whether his performance truly reflected his ability to understand the task.

Affect, Mood, Behavior and Personality Functioning: Mr. Kobs's affect during the evaluation was not fully congruent with his presentation. In other words, when talking about how he used to be able to stand up in front of people and make sense when he gave speeches, he became tearful, presumably over the fact that he now thinks he would not be able to make any sense in the same situation. However, throughout the evaluation he gave a series of poor – sometimes very poor – performances, yet did not seem at all distressed by these. During a break from the testing he was urged to do his best, in response to his question about how he was doing. He reported that he thought he was doing well, when he clearly was not. At the same time, he expressed distress that he can no longer do what he used to be able to do. If he were clearly upset about these

hypothesized changes, then it is unclear why he was not bothered more by his own poor performance during this evaluation, and completely unclear why he thought he was doing well when he was not, yet reporting that he is a very intelligent person who used to be much better at remembering and giving speeches.

Second, during the Conditional Associative Learning Task, this examiner inadvertently told him a correct response was wrong. He appeared to catch this error immediately, saying, "How can it be wrong," when he appeared otherwise to be having trouble doing the task. There was thus a lack of congruence between his presentation of himself as not being able to master the task, and his catching the examiner's mistake.

In order to clarify discrepancies between his actual performance and his expected level of performance based on achievements in education and occupation, Mr. Kobs was administered the Minnesota Multiphasic Personality Inventory – revised (MMPI-2). Mr. Kobs was not particularly willing to admit to ordinary human flaws. However, he was highly consistent in his responding. In fact, scores on TRIN (true-response inconsistency) and VRIN (variable-response inconsistency) were at the lowest level possible and thus were clearly not suggestive of nay-saying, non-acquiescence, or random responding. Thus, the elevation on the L scale likely reflected moderate "faking good," and the profile may thus not accurately represent the degree of psychological disturbance present.

Mr. Kobs is reporting poor physical health and denying good physical health. In fact, he is preoccupied with his physical functioning. Mr. Kobs responded in a way which suggests that he converts stress and difficulties into

physical complaints, or reacts to stressful events by developing physical complaints, such as headaches, chest pains, weakness or tachycardia. In fact, Mr. Kobs may be exhibiting classic conversion symptoms. Many people with this particular MMPI-2 profile develop somatic symptoms centered around headaches or abdominal pain. In fact, Mr. Kobs is reporting multiple physical complaints, such as headaches, dizziness and problems with balance. Symptoms appear very suddenly and may abate quickly as well. Although physical complaints may be the primary problems reported, he may also feel dysphoric and worried, lacking in energy and having difficulty concentrating and paying attention. He may feel that life is empty. He may appear apathetic. He is conventional and takes a cautious approach to life. At the same time, he is uninsightful about his own motives and feelings, resists psychological explanations or interpretations of his problems, and denies or represses feelings and psychological problems. He may respond well to direct advice or suggestion, if defenses (e.g., physical symptoms) are not challenged or threatened.

Mr. Kobs may also seek and expect attention and a lot of affection from others, and then use indirect or manipulative means to get them. He may be indirect interpersonally and not likely to express anger and resentment openly. He may be passive-dependent in relationships. He is sociable and wants to be liked. He may be somewhat superficial in interpersonal relationships. He appears to have a good marital relationship, and, while he was still working, probably had good work adjustment. However, because he produced a "faking good" profile to a moderate degree, there may be problems with adjustment and functioning which he did not report.

Overall, Mr. Kobs is not a good candidate for insight-oriented psychotherapy. However, supportive counseling, especially given the potential seriousness of his wife's condition, is recommended.

IV. COMMENT

Mr. Kobs, a 51-year-old, right-handed man, was evaluated for documentation of his cognitive baseline status in the setting of concerns about his memory. Mr. Kobs reported to his primary care physician that he was having progressive difficulty with his memory after he fell 35 feet, reportedly, from a roof while taking down Christmas decorations. He reported to this examiner that he landed on his left side, did not hit his head, fractured his left hand/thumb, and injured his left wrist, leg and shoulder. However, during this evaluation, he reported to this examiner that the source of his memory problems was a bruise to his head in 1999 when he leaned into a room and struck the left part of his forehead on the corner of a steel filing cabinet.

Neuropsychologically, Mr. Kobs's performance needs to be put into the context of the seriousness of the head injury suffered in 1999, since that is the event from which he and his wife both are dating the changes and deterioration in his memory. First of all, in that incident, he did not lose consciousness. In fact, he did not seek medical attention until the end of the next day, after a full day's work. It is unclear how he was able to function that day if he had a head injury the day before serious enough to have deteriorating effects on his memory three years later. According to the notes from his primary care physician, he did not complain to this doctor about his memory. Rather, his

complaints centered around pain – pain in his neck, lower back and head, in the form of headaches.

Second, Mr. Kobs was referred to a neurologist, John Floberg, M.D., for investigation of his complaints about his memory after the fall from the roof this year. Dr. Floberg thought that Mr. Kobs's memory complaints were secondary to depression, not to the effects of the fall. Reportedly, an MRI scan of his head, ordered by Dr. Floberg, revealed some sort of abnormality in the right frontal lobe, but what sort of abnormality was completely unclear from Dr. Melby's records, and Dr. Floberg's dictated note was not available for review. However, Dr. Floberg reportedly told Mr. Kobs that the abnormality on the scan was incidental, that is, unrelated to his memory complaints. Dr. Melby noted that Mr. Kobs took exception to Dr. Floberg's interpretation of his memory problems as the result of depression, since Mr. Kobs was insisting that his memory was deteriorating.

Third, the larger issue of Mr. Kobs's continuing presentation to physicians with complaints about pain needs to be noted here. Even before the fall from the roof in fact a couple of years before, Mr. Kobs was reporting pain in his leg. He had a knee operation, which evidently did not resolve his concerns about his knee, since after the surgery he complained that his knee was unstable and likely to give out. He also had chronic low back pain complaints. It is true that Mr. Kobs has degenerative disc disease in his lower back, according to the notes from Dr. Reiser, his orthopedic surgeon. However, even with pain medication and after physical therapy, it appeared that his complaints about pain continued. After further diagnostic work-up in response to his complaints, it was still unclear to Dr.

Reiser, according to his notes, that Mr. Kobs needed surgery even after the fall from the roof.

All of this background information suggested that Mr. Kobs might have presented himself in such a way as to confirm his own view of himself as memory-impaired and brain-injured. However, there are numerous implausible aspects of his performance which raise questions about the effort he exerted throughout this evaluation. First of all, Mr. Kobs's IQ, as measured here, was found to be 80, that is, just barely within the low average range. This is simply not believable. There is no possible way that a head injury of the severity described by Mr. Kobs could have lowered his IQ to this level. Furthermore, there were findings within the IQ testing that were also highly unlikely. Mr. Kobs obtained a score on Vocabulary, which measures knowledge of vocabulary, that was in the low average range. This seems an unusually low score for a man who finished two years of college at Boston College and who used to make speeches and sell cars, a man who reportedly was making an average of $80,000 a year or more and who probably relied on his verbal skills to help him make that kind of money. Furthermore, knowledge of vocabulary is pretty invulnerable to the effects of a mild head injury. That is, one of the least likely effects of a head injury is to lower one's score on Vocabulary. Second, on Block Design, he gave a highly variable performance. He failed a rather simple four-block design because he rotated it out of the proper orientation then rotated it back into the proper orientation after the time limit had expired, yet he quickly completed two nine-block designs that many patients find difficult. This sort of variability in performance, e.g., failing easy items and passing harder ones, is often seen in patients who are depressed or who are not doing their best

on ***all*** items. Third, Mr. Kobs got just one item right on Picture Arrangement – the first item. He then failed the next four items. This is a ***highly unusual*** performance, even for people who are mentally retarded. Mr. Kobs, even given how poorly he performed, is clearly not mentally retarded. Furthermore, it is again completely unbelievable that a person who suffered such a mild superficial injury would experience such devastating effects on his ability to arrange four picture cards in a temporally correct sequence in order to tell a simple story. Fourth, Mrs. Kobs reported that at times, Mr. Kobs is paying such poor attention that he seems not to be "getting it" at all. However, on measures of attention from the IQ test, like Digit Span and Letter-Number Sequencing, he performed within the low average range. Thus, his performance was not typical of someone who is "not getting it." In addition, on the Comprehension subtest from the IQ test, a test of common-sense reasoning and social judgement, Mr. Kobs gave his best performance, a performance solidly within the average range. People who really and truly are not "getting it" would be highly likely to do poorly on this particular test.

With regard to memory functioning, the findings are very interesting. Even though memory functioning was his primary cognitive complaint, there were aspects of memory functioning that were within the average range. His immediate recall and delayed retrieval of brief paragraphs was within the average range for age; the percentage of information retained over the delay interval was solidly average for age. On a very difficult immediate recall task, that is, recalling the Rey figure three minutes after copying it without having first been told that he would be asked to draw it from memory, Mr. Kobs's performance

was solidly average for age. Delayed retrieval, that is, drawing the same figure from memory ***thirty minutes after copying it*** was only mildly below average. It would ordinarily be expected that someone who has genuine memory problems would simply be unable to do this task at all, given how difficult it is. On the simpler task of recognizing parts of the figure that were copied, his performance was worse than on either immediate recall or delayed retrieval, e.g., it was mildly impaired. However, on the recognition task, Mr. Kobs made two Recognition Failure errors, that is, he failed to recognize two parts of the design that he drew on delayed recall. One of those Recognition Failure errors was for a part that he drew almost correctly on immediate recall and only marginally correctly on delayed retrieval because he drew it sloppily. Even so, Recognition Failure errors are highly uncommon in people who have actually sustained brain damage as the result of a head injury. Thus, the interpretation given when there are two of these types of errors done by people who are not brain-damaged is that they are not doing their best on the task. The only task on which he consistently demonstrated mild impairment in all aspects of retrieval was on the California Verbal Learning Test. However, his delayed recognition performance was very unusual on this task. Most people do better on delayed recognition that on delayed retrieval, especially people who have significant memory impairment. In Mr. Kobs's case, his performance on the delayed recognition task was two standard deviations below his delayed retrieval performance, a highly unlikely and unusual discrepancy.

Finally, on the Wisconsin Card Sorting task, a nonverbal reasoning and concept formation task requiring mental flexibility and the ability to profit from feedback, Mr. Kobs

gave another highly unusual performance with respect to the number of set losses. Set losses are the number of times a person stops using the correct problem-solving principle after five correct usages and reverts to a previously correct principle or an unrelated principle. Mr. Kobs lost set five times. This degree of set loss can reflect confusion, or distractibility and problems focusing on the task, or, as is thought in Mr. Kobs's case, resistance to the task. Mr. Kobs seemed to be trying not to make too many correct responses. After he had used each principle three times, he began oscillating back and forth between the two principles that were not in effect, as well as using an unrelated or irrelevant or "non"-principle, e.g., making a random response.

In terms of strengths, he demonstrated good visual memory for the Rey complex figure, solidly average commonsense reasoning and social judgement, and average recall of brief paragraphs.

With respect to personality functioning, as discussed above, Mr. Kobs appears to be having a conversion reaction, e.g., he may be converting psychological problems into physical symptoms, without any awareness of his behavior. Thus, the results of the MMPI-2 suggested that these efforts to make himself look cognitively impaired were not done deliberately, e.g., with the intent to deceive. Mr. Kobs's view of himself as physically unwell and cognitively impaired could have skewed his performance unintentionally in the direction of impairment, when in fact these results, when interpreted in light of all the available information, suggest the opposite – that he is not memory disordered or cognitively impaired. In other words, Mr. Kobs seems to have convinced himself that he has memory impairment, with, it would seem, Mrs. Kobs's unwitting

reinforcement. It was clear that she perceives him as having deteriorating short-term memory, but did not provide a lot of history to substantiate her view.

However, there is undeniable psychological disturbance here. Mr. Kobs was probably under-reporting psychological distress and maladjustment, given his distaste for admitting to normal human weaknesses and character flaws (an elevation to a T score of 70 on the Lie Scale). Thus, it is not clear to what lengths Mr. Kobs would go to reinforce his view of himself as physically unwell and cognitively impaired.

As noted above in the section on Personality Functioning, Mr. Kobs is not insightful about or aware of these behaviors, and he is not likely to benefit from psychotherapy which would offer sophisticated interpretations. However, Mr. Kobs has obviously dealt with a lot of difficult situations attendant upon his wife's diagnosis with breast cancer. She reported having a variety of other serious medical problems. He has some injuries as well as some chronic back problems which are likely to result in the experience of intermittent physical pain. Thus, he is vulnerable to depression and he endorsed some depressive symptomatology, most of it having to do with mental dullness. It is recommended that Mr. Kobs receive some supportive counseling and have the opportunity to discuss sources of stress in his life with a psychologist or social worker trained in helping people who are caregivers. It would appear that Mr. Kobs has in fact on a number of occasions assumed the role of caregiver of his wife. He appears to need additional support.

In summary, the results were not consistent with the presence of memory problems secondary to a closed head

injury. There was in fact no real evidence that he had sustained a closed head injury, e.g., an injury that would have produced cognitive effects. Mr. Kobs's performance was thought to be influenced by his conviction that he is ill and his denial of physical and cognitive well-being. Although an absence of progressive memory loss should be good news, it probably will not be greeted with much enthusiasm. There was evidence of a tendency to convert stress reactions to physical symptoms, and to be unaware of underlying psychological conflicts or concerns. Mr. Kobs was thought to be experiencing more psychological distress than he was willing to acknowledge. It was recommended that he receive supportive counseling. A referral to William Robiner, Ph.D., ABPP, L.P. or Diane Bearman, Ph.D., L.P., health psychologists in the Department of Medicine here at Fairview-University Medical Center, is suggested. This referral would be made by Dr. Melby. Dr. Robiner may be reached at (612) 624-1492, and Dr. Bearman at (612) 624-0933.

With regard to the issue of a return to work, Mr. Kobs passed along a variety of disability forms to be completed. It is this examiner's opinion that he is not cognitively disabled or memory impaired. However, he appears to have some psychological disturbance at this point which would render it difficult for him to be a fully engaged worker, e.g., he sees himself as too sick to work and he is sincerely convinced of this view. Further, this view has been reinforced by his family. He has physical injuries and chronic low back pain. It is therefore also recommended that he be referred to Miles Belgrade, M.D., at Fairview-Riverside, for help in dealing with what appears to be a chronic pain syndrome. Dr. Belgrade may be reached at

(612) 273-5400. Again, Dr. Melby would make this referral if he deemed it appropriate.

The opportunity to address questions regarding Mr. Kobs's cognitive status is appreciated. Thank you for the very interesting referral. If there are questions about this evaluation, please do not hesitate to call (612) 625-7423.

/s/ Mary Sullivan, Ph.D., L.P.
Mary Sullivan, Ph.D., L.P.
Assistant Professor of Neurology

No. 05-394

IN THE

Supreme Court of the United States

ELVIS KOBS,

Petitioner,

v.

UNITED WISCONSIN INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

INTEREST OF AMICUS CURIAE

Legal Services for the Elderly (LSE) of New York City, New York, submits this brief amicus curiae, pursuant to Supreme Court Rule 37, in support of the petition for issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of its judgment in *Elvis Kobs v. United Wisconsin Insurance Co.*, 400 F.3d 1036 (7th Cir. 2005). Both Petitioner and Respondent have consented in writing to its submission.[1]

Founded in 1968, LSE is the oldest organization in the country devoted to the provision of legal services to the indigent elderly. LSE specializes in cases involving Social Security and Supplemental Security Income, Medicaid, and disability, pension, and other private employee benefits. LSE assists legal services lawyers by co-counseling in law reform litigation and by providing advice, pleadings, memoranda of law, and briefs amicus curiae.

Like the case at bar, many of LSE's cases have addressed issues concerning adjudicative fairness, including several successful challenges to the procedures used in adjudicating entitlement to employee benefits.[2]

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[1] Pursuant to Sup. Ct. R. 37.6, LSE's counsel of record hereby certifies that this brief was authored in whole by LSE attorneys, and that no individual or entity other than amici curiae LSE has contributed monetarily to the preparation or submission of this brief.

[2] Outside of the employment arena, LSE has been active in challenging procedures that deny the indigent elderly fair and just adjudications of their rights. *See, e.g., Varshavsky v. Perales*, 202 A.D.2d 155, 608 N.Y.S.2d 184 (N.Y. App. Div. 1994) (successfully resisting an attempt by the State of New York to eliminate face-to-face hearings at home for the homebound disabled); *Kendrick v. Sullivan*, 784 F. Supp. 94, 102 (S.D.N.Y. 1992) (granting class certification and denying motion to dismiss in action ultimately settled by reopening of cases decided by biased administrative law judge) ("The right to an impartial adjudication is a basic element of due process. This aspect of

See Bunting v. McCall, 280 A.D.2d 774, 719 N.Y.S.2d 907 (N.Y. App. Div. 2001) (requiring evidentiary hearing to determine whether application for benefits was timely); *Ortiz v. Regan*, 769 F. Supp. 570 (S.D.N.Y 1991) (finding that agency's failure to hold pre-deprivation hearing for termination of benefits violated procedural due process); *Weaver v. New York City Employees' Retirement System*, 717 F. Supp. 1039 (S.D.N.Y. 1990) (holding that officials' actions in terminating benefits violated procedural due process). In recognition of LSE's contributions and expertise in employee benefits, the Administration on Aging (AoA), part of the U.S. Department of Health & Human Services, has awarded several multi-year grants to LSE to provide advice and advocacy to individuals with pension problems throughout New York and New Jersey.

The Seventh Circuit's rule attacked by Petitioner—namely, that "dual-role" insurers[3] are considered to act neutrally in the absence of specific evidence provided by the claimant showing a conflict of interest—is substantially the same as that followed by the Second Circuit and the district courts subject to its authority. These courts are the principal forums in which LSE litigates cases involving ERISA-governed benefit plans. Ten years ago, when the Second Circuit first announced its highly deferential standard in *Pagan v. NYNEX Pension Plan*, 52 F.3d 438 (2d Cir. 1995), LSE immediately understood its potential significance and appeared as *amicus curiae* in support of an unsuccessful motion for reconsideration.

Unfortunately, in the ten years since *Pagan* was decided, LSE's fears have been confirmed, as the opinion has become one of the most frequently cited employee

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due process applies equally in an administrative setting as it does in a judicial forum.").

[3] As noted by Petitioner, a "dual-role" insurer both makes benefits eligibility determinations and is financially responsible for paying any benefits it grants. Pet. 2.